Supreme Court of the United States

OCTOBER TERM, 1925.

No. 471.

HELEN P. BARDWELL, HARRIOT P. AYER and ALICE P. FOREMAN, *Plaintiffs and Appellants,*

vs.

SARGENT LAND COMPANY, a corporation; SAMUEL LORD, JAMES G. ARMSON and CHRIS HALDEN, as constituting the MINNESOTA TAX COMMISSION; CLIFFORD L. HILTON as Attorney General of Minnesota; RAYMOND P. CHASE as State Auditor of Minnesota; and HENRY REHER as State Treasurer of Minnesota, *Defendants and Respondents.*

BRIEF FOR APPELLANTS.

JOHN R. VAN DERLIP,
FRED B. SNYDER,
EDWARD C. GALE,
Solicitors for Appellants,
Minneapolis, Minnesota.

JOHN G. MILBURN,
Of Counsel,
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The decision and opinion of the court below in this case has not been reported as yet.

JURISDICTION OF THE COURT

(1) This case comes up on appeal by the plaintiffs from a decree of the United States District Court for the District of Minnesota, 5th division, made and entered January 15, 1925 (R. 74).

(2) This is a suit in equity brought in the District Court by the plaintiffs who are citizens and residents of the States of Massachusetts and California, and stockholders in defendant Sargent Land Company (R. 59), to restrain said company and its officers from paying an alleged illegal tax, threatened to be levied upon property of the Corporation under the provisions of Chapter 226 of the laws of 1923 of the State of Minnesota (R. 42). The Corporation was organized, and exists under the laws of Minnesota, and is domiciled therein (R. 59).

The specific claims of the defendants are: that said Chapter 226 is unconstitutional and void, as transcending the provisions of Sec. 1 of Art. 9 of the Constitution of Minnesota, that "taxes shall be uniform upon the same class of subjects"; also Sections 33 and 34 of Art. 4 of said Constitution prohibiting special legislation and requiring all laws to be uniform in their operation throughout the State; also Sec. 7 of Art. 1 of said Constitution, that "no person shall be deprived of life, liberty or property without due process of law"; also the provisions of Sec. 13 of Art. 1 of said Constitution, that "private property shall not be taken, destroyed or damaged for public use without compensation therefor first paid or secured." Plaintiffs further claim that said Act violates the 5th Amendment of the Constitution of the United States, providing that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation, and the provisions of the 14th Amendment to the Constitution of the United States, that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws (Par. 11, R. 4-5).

(3) The amount in controversy exceeds three thousand dollars ($3,000) (R. 59). The defendants other than said Corporation are officers and officials of the State of Minnesota (R. 60), who threaten to, and will unless restrained by the court, enforce collection of the tax (R. 64 (20)). The officers and agents of the corporation likewise threaten to, and will unless restrained by the court, pay any tax so levied (R. 64 (b)), and irreparable injury will result which can not be compensated by an action at law (R. 65).

(4) The court below had, and recognized, jurisdiction of the suit upon the grounds, (a) that the matter in controversy exceeds, exclusive of interests and costs, the sum or value of three thousand dollars ($3,000); (b) that the suit involves the constitutionality of Chapter 226 of the laws of 1923 of the State of Minnesota, which purports to impose a tax of six per cent (6%) upon all royalties received for permission to explore, mine, take out and remove iron ore from lands in the State of Minnesota, which Chapter is asserted to be invalid as in violation of the 5th Amendment of the Constitution of the United States, providing that no person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation; and in violation of the 14th Amendment of the Constitution of the United States, providing that no State shall deprive any person of property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws; (c) that the controversy is between citizens of different states.

Judicial Code, Sec. 24.

(5) This court has jurisdiction of the appeal under the provisions of Judicial Code, Sec. 238, inasmuch as the case involves the construction or application of the 5th and 14th Amendments of the Constitution of the United States, the lower court in its decree having held that the Act referred to is not in violation of said Amendments (R. 66, 67, 68, 70, 73).

Loeb vs. Trustees of Columbia Township, 179 U. S., 472.

Fidelity Mutual Life Ass'n. vs. Mettler, 185 U. S., 308.

Davis & Farnum vs. Los Angeles, 189 U. S., 207.

Dawson vs. Kentucky Distilleries, 255 U. S., 288.

Brushaber vs. Union Pac. R. R., 240 U. S., 1.

Nevada Cal. Coal Co. vs. Hamilton, 235 Fed., 317, 339.

Oliver Mining Co. vs. Lord, 262 U. S., 172.

(6) An illegal tax paid even under protest can not be, in Minnesota, recovered back (R. 65 (21)).

In re Delinquent Taxes, 155 Minn., 258, 262.

STATEMENT OF CASE.

In 1923 and for some years prior thereto all tangible property in Minnesota has been subject to a general *ad valorem* tax and has been classified by the Legislature into four classes with a graduated rate of assessment as follows:

1. Iron ore whether mined or unmined to be assessed at 50% of its true and full value;
2. All household goods at 25% of their true and full value;
3. All live stock, agricultural products, merchandise and unplatted real estate at 33⅓% of their true and full value;
4. All other property at 40% (R. 46).

Minnesota has never had a State income tax.

There has existed, however, during the period in question a "Moneys and Credit" tax of three mills on the dollar upon cash in hand, bank deposits and all choses in action (R. 47).

Conceiving that the iron mining industry of the State could and should bear a still greater proportion of the tax burden, the Legislature of Minnesota in 1921 enacted Chapter 223 of the Laws of that year levying a tax of six per cent as an additional tax in the nature of an excise or occupational tax upon the mining industry of the State. That tax has been reviewed by this Court and its validity sustained, with qualifications.

Oliver Iron Mining Co. vs. Lord, 262 U. S. 172.

It is the only occupational tax in Minnesota.

In 1923 the Legislature deeming the way open for a still further tax upon the mining interests of the State enacted Chapter 226 of the Laws of Minnesota entitled "An Act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this State for permission to explore, mine, take out and remove ore from the same" (R. 42). As before stated this action is a suit in equity brought by plaintiffs as stockholders against the Sargent Land Company to restrain the corporation from paying, and the other defendants who are officers of the State of Minnesota from

enforcing, the tax attempted to be levied under this Act. Such facts as are pertinent to the issues of the case are set out in an agreed statement of facts (R. 59).

Briefly, the Sargent Land Company was organized for the sole purpose of receiving and uniting in one ownership title to certain lands in Minnesota until then held by its numerous stockholders in undivided fractional shares, and of liquidating and converting the same into money for distribution to its stockholders, all of which its Articles of Incorporation specifically recite (R. 59). Pursuant to such purpose it became and now is the owner in fee of certain mineral lands in Minnesota by conveyance from those persons who are now its stockholders, some of which lands are leased, some not; and the iron ore in still others sold under sale-contracts. From the lands so leased and from the lands in which the iron ore has been sold under sales contracts the corporation received in the year 1923, and will continue to receive, substantial sums of money by way of royalties or as installments of purchase price on iron ore sold; and it is on these royalties and installments of purchase price that the tax in question is attempted to be levied. The corporation is not authorized to engage in the business of mining and has never engaged in such (R. 60). It is the same corporation respondent in the case of *von Baumbach vs. Sargent Land Co.*, 242 U. S. 503, in which was involved chiefly the question of royalties as income under the Federal Corporation Tax Act of 1909.

The basis for the instant suit is that the taxing Act in question is unconstitutional and void in that it violates those constitutional clauses of the State of Minnesota or of the United States providing that all taxes shall be uniform upon the same class of subjects, prohibiting special legislation, and providing that no person shall be deprived of property without due process of law.

In addition to these constitutional questions, there is involved in this case, but not in the other cases on appeal in this Court relating to the Act in question, a further question of construction of the Act, should its validity be sustained by this Court.

Some of the revenues of defendant Sargent Land Company threatened to be taxed under the Act in question are derived from a certain "Sale Contract of Ore" (R. 23), and it is the contention of plaintiffs that the receipts from this source are not within the intent and meaning of the Act.

The further question is involved also in this case whether certain royalties received by defendant Sargent Land Company in 1923 for ore mined and removed in 1922 prior to the passage of the Act, and certain other royalties due in October, 1922, but not in fact paid until 1923, are or can be taxable under this Act.

There has been no decision of the Supreme Court of the State of Minnesota nor of any court of that State respecting the Act in question.

ASSIGNMENTS OF ERROR URGED

(1) The Court erred in holding that Chapter 226 of the laws of Minnesota for 1923 does not violate Section 1 of Article 9 of the Constitution of Minnesota, requiring that taxes shall be uniform upon the same class of subjects.

(2) The Court erred in holding that said Chapter 226 does not violate Sections 33 and 34 of Article 4 of the Constitution of Minnesota, prohibiting special legislation.

(3) The Court erred in holding that said Chapter 226 does not violate Section 7 of Article 1 of the Constitution of Minnesota, providing that no person shall be deprived of property without due process of law.

(4) The Court erred in holding that said Chapter 226 does not violate Section 13 of Article 1 of the Constitution of Minnesota, providing that private property shall not be taken for public use without just compensation.

(5) The Court erred in holding that said Chapter 226 does not violate the Fourteenth Amendment to the Constitution of the United States, securing to all persons within the State of Minnesota the equal protection of the laws.

(6) The Court erred in holding that said Chapter 226 is not in violation of the provision of the Fourteenth Amendment to the Constitution of the United States, that no state shall deprive any person of property without due process of law.

(7) The Court erred in holding that said Chapter 226 is a valid and enforcible law.

(8) The Court erred in holding that the tax sought to be established by said Chapter 226 is lawful and enforcible.

(9) The Court erred in holding that the tax imposed by said Chapter 226 upon "royalties" is a valid tax upon the interest in the land of the person or persons entitled to receive such royalties for permission to explore, mine, take out and remove ore from land in the State of Minnesota.

(10) The Court erred in holding that the classification for

taxation of such "royalties" separately from other rents derived from land in the State of Minnesota is reasonable and valid.

(11) The Court erred in holding that the classification for taxation of such "royalties" separately from other moneys belonging to the taxpayer is reasonable or valid.

(12) The Court erred in holding that said Chapter 226 is uniform in its tax imposition and burden upon the same class of subjects.

(13) The Court erred in holding that the depletion of the value of mineral lands by removal of ores therefrom constitutes a lawful basis for discrimination against, or separate classification of, such property in respect of taxation.

(14) The Court erred in holding that the depletion of the value of mineral lands by the removal of ores therefrom, constitutes a valid basis for the taxation of royalties paid or received for permission to explore, mine, take out and remove ore from such lands.

(15) The Court erred in holding that the fact that practically all of the iron ore mined in Minnesota is transported beyond the limits of the State, constitutes a lawful basis for the separate classification for taxation of royalties paid or received for permission to explore, mine, take out and remove such ore from land in Minnesota, or for taxation of any interest in such land.

(16) The Court erred in holding that installments of purchase money received by a vendor for the sale of iron ore in place in lands in Minnesota are "royalties" within the purview of said Chapter 226, and taxable thereunder, even if said law be valid and enforcible as respects royalties paid and received for permission to explore, mine, take out and remove ore from land in Minnesota.

(17) The Court erred in denying to the plaintiffs the relief sought by them in this action, and every part thereof, and in entering a decree dismissing the bill of complaint.

Summary of Argument

I. Nature of Tax discussed (p. 15).
First: As an Excise or Occupational tax (p. 16).
Second: As an Income or Property Tax (p. 18).

II. The Act is invalid in any case for lack of proper classification required by the State and Federal Constitutions (p. 20).

III. The Act is invalid for lack of proper uniformity of treatment among members of the same class (p. 34).

IV. The Act does not and cannot apply in any event to royalties for ore mined prior to January 1st, 1923; nor to royalties due prior to that date though paid afterward (p. 40).

V. Even if the Act be valid, moneys received under the "Sale-Contract" (Exhibit 2) in this case are not taxable under the terms of the Act (p. 49).

What is royalty (p. 52).

The contract for sale of ore (p. 59).

Detailed provisions of Exhibit 2 (p. 61).

Intention of parties must prevail (p. 71).

Concerning Mining Leases (p. 72).

Interpretation of Exhibit 2 (p. 75).

Decree must be reversed or modified (p. 93).

ARGUMENT.

POINT I.

NATURE OF TAX.

The Act in question is entitled "An Act providing for the levy and collection of a tax on royalty received by the owner of any right, title or interest in land situate in this State for permission to explore, mine, take out and remove ore from the same." Section 1 provides: "There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter for permission to explore, mine, take out and remove ore from land in this State a tax of 6%." Section 2 provides: "For all purposes of this Act the word 'royalty' shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this State for permission to explore, mine, take out and remove ore therefrom, and the word 'person' shall be construed to include individuals, co-partnerships, associations, companies and corporations." Section 8 provides "The situs of royalty for all purposes of this Act shall be in this State and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is based."

Other provisions of the Act are administrative leading up to a personal judgment in the District Court in case the tax be not paid, which judgment "shall be a lien upon all right, title and interest of the taxpayer to the land upon which such tax is a lien from the time the same is docketed."

Before determining the validity of this unusual taxing Act, and so far as we are aware it is not only the first of its kind in Minnesota but the first anywhere, it is desirable, if indeed not

essential, to determine the nature of the tax attempted to be levied. Whether it offends against the Constitutional guarantees of uniformiy and classification depends upon the class of subjects intended to be reached. The tax styles itself, "tax on royalty," and royalty is defined to mean "the amount in money or value of property received.... for permission to explore, mine, take out and remove ore." It is not necessary to call attention to the fact that "this Court is not bound by names but will determine the nature of a tax for itself" in its effort to ascertain the subject of the tax.

New York Tel. Co. vs. Dolan, 265 U. S. 96.

The nature of a tax depends "upon the mission given it by the law under which it is levied" and the phraseology is not controlling.

In re Skelton, 197 Pac. Rep. 495 (Okl.).

This Court has been called upon many times to discuss the nature of a proposed taxing Act in the determination of its constitutionality. The following are instances:

Dawson vs. Kentucky Distilleries, 255 U. S. 288.
Zonne vs. Minneapolis Syndicate, 220 U. S. 187.
Pollock vs. Farmers Loan & Trust Company, 157 U. S. 429.
Philadelphia Company vs. Pennsylvania, 122 U. S. 326.
Watson vs. State Comptroller, 254 U. S. 122.
Flint vs. Stone Tracy Company, 220 U. S. 107.

FIRST: IS THE TAX IN QUESTION AN EXCISE OR OCCUPATIONAL TAX?

An affirmative answer to this question is not decisive of plaintiff's case, for even if the tax be held an occupational tax, it is still subject to the defect of lack of proper classification and uniformity to be later discussed. Nevertheless, it may be doubted whether the tax can be of that nature. The mere right to own and hold property cannot be made the subject of excise.

Nor can the mere act of receiving royalty or of giving permission to mine ore from one's own land amount to a business or occupation such as can be reached by the taxing power under the guise of an occupational tax.

"What is land but the profit thereof." 1 *Coke on Lit.*, 45.

We shall not discuss in detail but will simply cite the many cases in this and other courts in which taxing Acts purporting to tax the various rights inherent in ownership have repeatedly been held void, or at least something else than an excise or occupational tax.

Dawson vs. Kentucky Distilleries, 255 U. S. 288.
Thompson vs. McLeod, 112 Miss. 383.
Thompson vs. Kreutzer, 112 Miss. 165.
Craig vs. Taylor, 232 S. W. Rep. 395 (Ky. 1921).
State vs. Gillespie, 197 Pac. Rep. 508 (Okl.).
In re Skelton Company, 197 Pac. Rep. 495 (Okl.).
Gillespie vs Oklahoma, 257 U. S. 501.
Pollock vs. Farmers Loan & Trust Company, 157 U. S. 429.
Parker vs. Insurance Company, 42 La. Ann. 428.

Mere ownership of land does not constitute doing business.
Cambria Steel Company vs. McCoach, 225 Fed. Rep. 276.

Nor would it seem that an excise tax can be laid upon a land owner merely by reason of his exercising the rights of ownership and disposing, either by sale, lease, license or otherwise, of his property interest therein.

The Act in question further lays its taxing hand upon a single "permission" or upon a single royalty payment. The granting of a single "permission" or a single receipt of money is as much within the scope of the Act as a thousand receipts and a thousand leases. It must be therefore something else than the *business* of receiving royalty or the *occupation* of giving permission to mine which is intended to be reached by the Act.

Moreover, a privilege, when once exercised, is *functus officio,* and is not capable of re-exercise as respects any specific contract. What was a lawful exercise of the privilege at the time the contract was entered into, cannot be taxed twenty years hence. Even if Chapter 226 be valid as an excise tax law as respects grants of permission to mine and remove ore thereafter, all such agreements made prior thereto must be unaffected thereby.

Lewellyn vs. Frick U. S. Sup. Ct., 15 Adv. Op. 585.

State vs. Crete Mining Co. (Minn.), 204 N. W. Rep. 932.

It is to be noted further, that, if an excise tax, it cannot be made to operate against non-residents as the privilege or act of leasing or executing instruments may be just as well exercised or performed *outside* the State of Minnesota even though the lands be located therein.

Shepard vs. State of Wisconsin, 197 N. W. Rep. 344.

SECOND: IS THE TAX THEN AN INCOME TAX OR IS IT A PROPERTY TAX?

If an income tax, we may note in passing that it is most unjust in that it is laid on gross receipts without deduction for capital return, expenses of operation or administration. "Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets."

Eisner vs. Macomber, 252 U. S. 207.

Merchants Loan & Trust Co. vs. Smietanka, 255 U. S. 518.

In 1923 when Chapter 226 was enacted, depletion in the nature of a return of invested capital as of March 1, 1913, was recognized by Section 214 (a) 10 of the Federal Revenue Act of 1921, and outlays in the nature of expenses incurred in checking royalty payments against ore actually mined, under rulings of the Internal Revenue Department, were allowed in ascertaining the gain or income received by a taxpayer from royalties paid to

him. Considering these facts and the fact that the sum total of royalties received may conceivably in a given case be less than the original capital invested, involving a loss rather than a gain as a result of the entire transaction, it can hardly be believed that the Legislature intended this to be an income tax.

But these plaintiffs are not particularly concerned whether the tax be of the nature of an income tax or a property tax; and, if a property tax, whether the property taxed be royalty in the sense of the money itself *in specie,* or whether it be the land or whether it be a particular interest in land. The learned trial judge in his memorandum seemingly has reached the conclusion that it is "essentially a tax upon the interest in the land owned by the person by whom the tax should be paid.....The amount of the royalty is the basis to be used in the computation of the tax" (R. 73). If it be a tax on such special interest in land, the Act creates a new and unnamed interest in real property hitherto unknown to the law; and the tax differs fundamentally from other real estate taxes in Minnesota, which are based on the *true value* of the real estate including every interest therein as ascertained and determined by official assessors and Boards of Equalization. Another fundamental difference to be noted is that other real estate taxes in Minnesota are assessed *against the land* and are enforced by proceedings *in rem,* while the tax under this Act is apparently assessed against the owner in his personal capacity and enforced by a suit *in personam,* similar to other personal property taxes.

State, ex rel Vossen vs. Eberhard, 90 Minn. 120.

POINT II.

THE ACT IS INVALID IN ANY CASE FOR LACK OF PROPER CLASSIFICATION REQUIRED BOTH BY THE STATE AND THE FEDERAL CONSTITUTIONS.

In discussing the uniformity and classification required by the State and Federal Constitutions we conceive it makes but little difference to which general class this tax be assigned or what name be given it—whether excise or income or property tax. If it be an excise tax, it is a tax on the particular occupation of granting permission, or of receiving royalties for the permission so granted, to mine ore. If it be an income tax, and even if income generally may be made the subject of separate classifications, the subject of this tax is that particular income which as royalty is derived from permission to mine ore. If it be a property tax on money in specie, it is likewise a tax on that particular money derived as royalty from the same source. If it be a property tax on land, it is a tax upon that particular kind of land which produces a royalty from permission to mine ore. If it be, finally, a property tax on an interest in land, it is a tax upon that special and particular interest in land owned by a person who receives a royalty for permission to mine ore therefrom.

One refinement in classification after another characterizes each of these definitions and *they are the same refinements.* The ultimate subdivision, the irreducible characteristic reached at last in every case and common to all is the "permission to mine ore" resulting in "royalty."

In other words what in the last analysis is really taxed is that particular occupation which engages itself in granting "permission," or in the receiving of royalty for "permission," to mine ore; *or* that particular income which is royalty received from such "permission"; *or* that particular money or "value of property" reduced to money received as royalty from such "permission"; *or* that particular kind of land from which a royalty is received for

such "permission"; *or* finally that particular and special ownership interest in land which produces royalty from such "permission" to mine ore. It is clear that the precise thing which the Legislature really had in mind to tax is this highly specialized thing, royalty, even if it be far from clear what legal method the Legislature had in mind in getting at it. At any rate, all the possible classifications of the Act come to this same end.

Has the Legislature in this classification overstepped its constitutional limitations? The constitutional guarantees of the State of Minnesota urged in this case are that taxes shall be uniform upon the same class of subjects (Art. 9, Sec. 1); that no person shall be deprived of life, liberty or property without due process of law (Art. 1, Sec. 7), and that when a general law can be made applicable no special law shall be enacted (Art. 4, Sec. 33). The constitutional guaranty of the Constitution of the United States also urged by plaintiffs is the 14th Amendment that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. All these guarantees, State and Federal, run more or less parallel. They may be considered together so far as this case is concerned under a general discussion of the uniformity and classification which they require or restrict, as the case may be, in order properly to protect the individual against the arbitrary or tyrannical exercise of power by the majority under the guise of law.

This is not a new thing and we shall not burden the Court with all the citations upon the subject. Suffice it to say that the legislature has not unrestricted power of classification. Thus, in *Gulf etc. Railway Co. vs. Ellis*, 165 U. S. 150, the Court said:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the

attempted classification—and is not a mere arbitrary selection."

Again in *Southern Ry. Co. vs. Greene,* 216 U. S. 400, we find:

"While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect of which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. *Arbitrary* selection, it has been said, cannot be justified by calling it classification."

In the leading case of *Citizens Telephone Co. vs. Fuller,* 229 U. S. 322, the Court after reviewing previous cases sums up the matter as follows:

"These cases illustrate the power of the Legislature of the State over the subjects of taxation and the range of discrimination which may be exercised in classifying those subjects when not obviously exercised in a spirit of prejudice and favoritism. * * * Granting the power of classification we must grant government the right to select the differences upon which the classification shall be based and they need not be great or conspicuous. * * * The State is not bound by any rigid equality. This is the rule; its limitation is that it must not be exercised in clear and hostile discriminations between particular persons and classes."

So in Minnesota the court in the leading case of *State vs. Brown,* 97 Minn. 402, said:

"The general principles which underlie and control the theory of permissible classification are now well settled in this State. The basis of classification must not be arbitrary or illusory. Having reference to the particular legislation, there must be some substantial distinction which suggests a reasonable necessity or propriety for different laws for the objects or places embraced within or excluded from the class. There must be something suggested by a difference in the situation and circumstances of the subjects placed in different classes, which discloses the necessity or propriety for different legislation in respect thereto. The classification must be founded upon legitimate differences in situation,

population, or inherent condition. The places or things included must have some characteristics or peculiarities distinguishing them from those which are excluded. The basis must be sufficiently broad to include all subjects whose conditions and wants render such legislation equally appropriate."

In *Mutual Benefit Co. vs. County of Martin*, 104 Minn. 179, sustaining the validity of a special mortgage registry tax law, the Court makes this definition:

> "The classification must be reasonable and such as is suggested by essential differences of nature, situation or circumstances, or by characteristics, which make it desirable on grounds of public policy to apply to the members of the class a particular method of taxation, *and impracticable to apply thereto the ordinary methods of taxation.*"

In *Dohs vs. Holm*, 152 Minn. 529, the Court said:

> "It has been settled by previous decisions that all limitations upon the power have not been removed. It must not be exercised in a spirit of prejudice or favoritism. The classification must be based on differences furnishing a reasonable ground for distinction between the several classes."

The latest case in Minnesota, reviewing previous authorities and holding that assessed valuation alone is not a proper basis for classification of counties for purpose of legislation authorizing the acquisition of parks, is

Driscoll vs. Board of Commissioners (1925), 201 N. W. Rep. 945, the Court saying, after a discussion of the cases and citing from *State vs. Brown* the quotation above noted,

> "the critical questions in this case are as to whether the classification is germane to the subject of the law, and is there a relation between the assessed valuation and the public necessity or propriety of recreation grounds? The Legislature is the lawmaking power of the state. If the necessity for this law calls for the exercise of discretion in the classification of particular sub-divisions of the state for the purpose of legislation, we cannot review such discretion and substitute the views of the court as to the propriety of the classification. 'It is only when the classification is so manifestly arbitrary

as to evince a legislative purpose of evading the provisions of the constitution that the courts may and must declare the classification unconstitutional'."

State vs. Westfall, 85 Minn. 437.

"A valid classification should be based upon some natural reason. The counties put in the particular class should require different legislation than those counties omitted therefrom. * * * A law is uniform in its operation if it operates equally upon all the subjects within the class of subjects to which it is applicable; but the Legislature cannot adopt an arbitrary classification even though the law may operate equally upon each subject of each of the classes adopted. * * * The practical limitation is that the classification shall be based upon some natural reason founded in necessity or arising out of differences in the situation and circumstance of the subjects classified making it advisable for different legislation with respect to them. The classification cannot be merely arbitrary. * * * Classification may be very appropriate for legislation on one subject but not for legislation on another subject."

It is to be noted also that taxing acts are to be scrutinized more strictly in this respect than other measures. "This ordinance is not a property taxing measure wherein the rule of uniformity and against discrimination is applied much more strictly than when an ordinance is directed at the licensing of a business which is a proper subject for regulation."

Jefferson Co. vs. City of St. Cloud, 155 Minn. 463, at p. 468.

Applying the rule thus stated, the Minnesota Courts have repeatedly held legislative Acts unconstitutional. Besides the Driscoll case the following are some of the later cases:

Farley vs. City of Duluth, 150 Minn. 374,

holding an exemption of peddlers of farm products from wheelage tax invalid.

Hjelm vs. Patterson, 105 Minn. 256,

holding a classification of counties based on population an im-

proper basis in an Act authorizing the employment of Superintendent of Highways.

State vs. Erickson, 159 Minn. 287,
holding the exemption of minors in a game license law an invalid classification.

State vs. Parr, 109 Minn. 147,
holding an Act taxing peddlers invalid which discriminated between those who sold their own products and those who sold the products of others.

State vs. Fitzgerald, 117 Minn. 192,
holding a taxing Act invalid which discriminated between mortgages over and those under $50.00 in amount.

State vs. Minnesota Farmers Ins. Co., 145 Minn. 231,
holding an Act taxing certain insurance companies invalid which attempted to set up a classification based on salaries paid the officers of such companies.

Coming now to the application of the rule to the facts in the instant case, is the segregation and classification of royalties received for the permission to mine ore, picking out that particular item from all the wide range of things and classes taxable, a fair exhibit of that uniformity which is required under the Constitution? Is the distinction between it and other kindred interests, objects, properties and property rights not taxed such as to suggest at once an essential or even a reasonable difference in substance or kind or situation or theory of taxation which renders the taxing of the one to the exclusion of all the others a fair and legitimate exercise of the taxing power? Is it not quite evident that, notwithstanding the already onerous and unequal burden of taxation upon the mines and mining industries of the State, the Legislature, its cupidity excited by an exaggerated illusion of mysterious wealth, essayed a further adventure on the uncharted seas of taxation in search of buried treasure and, thinking it had located it, proceeded at once to try to possess itself of it by

taxing it in a spirit alike arbitrary, discriminatory, unreasonable and unfair?

Perhaps iron ore may be classified separately for purposes of taxation, although the Minnesota courts have not passed squarely on this question. At any rate the Legislature apparently did not dare to come out openly and increase the ad valorem tax on this species of property then already higher than on any other class; nor did they dare increase the tax on the mining industry under the occupational tax, the only occupational tax in Minnesota. What they did do was to add another and third tax upon the mining properties of the State under the guise of this so-called royalty tax. But these "royalties" do not include returns from all ore or mineral lands, nor all ore or returns from mineral lands. It applies to only those special and peculiar returns resulting from the "permission to mine ore." The thing taxed, whether income or property, is therefore limited to the particular method of realizing on ore lands through this "permission," i. e., through leases or licenses. This is the ultimate basis of the classification. *The incidence of the tax depends solely therefore upon the technical machinery by which the owner seeks to make use of his property and enjoy its fruits.* If he sells his land or his ore outright for cash, there is no tax under this Act either on the gross proceeds or on the profits. If he sells his land or ore on installments of payment, under no reasonable construction of the Act can there be a tax. If he mines the ore himself there is no tax. If as lessee he sells his lease either outright for cash or on installments of payment, there is no tax on the proceeds or the profits. If however he gives a lease or license to another, granting the right to mine the ore, at once upon the adoption of this technical method of handling the property, the tax springs into existence. Nor are these cases of sales, outright or on installments, or of owners mining on their own account mere hypothetical assumptions. Defendant Sargent Land Company has itself disposed of mineral land in that way (R. 61), one sale outright for cash being made

in 1923, and instances of such, as well as of owners themselves operating their own mines, are not uncommon (R. 63). We submit therefore that any tax which is levied in connection with the right to mine ore but which is limited to the "royalties" received from leases or licenses to the exclusion of all other methods of realizing on such right, is based on an entirely too narrow and restricted foundation and is an arbitrary, technical and unreasonable classification and lacking in that fair measure of uniformity which the constitution requires.

But it is said these deposits are "wasting assets" which in time are lost to the State and for that reason furnish a proper basis for the separate classification of leases and licenses. Parenthetically it may be presumed that no one regrets the "wasting" characteristic of mining property more than the owner himself and it would seem a bit unjust to penalize him by an extra burden of taxation for something he cannot help and would gladly remedy if he could. But other methods of handling ore properties may and do work the exhaustion of the ore, as well as leases or licenses

A vendor may require the mine to be operated to make sure of his purchase price. An owner may mine and exhaust more swiftly than a lessee. We can see no essential or reasonable difference between these cases on which to base a separate classification. The learned court below in its memorandum (R. 72) refers to the "identification of separate interests" for the purpose of taxation, as though that in itself furnished sufficient basis for separate classification of those interests. We respectfully urge that the very identification of the "interest" taxed will itself often furnish sufficient proof of the invalidity of a classification, when there is no apparent sound reason why one interest shall be taxed and not the other.

But it is argued that the basis for classification may be founded in "the purpose and policy of taxation"; and that when construed with the Occupational Tax Act before referred to, sufficient legal basis is found for the classification in this Royalty Tax Act. It is

true that the Occupational Tax Act, being a tax on the business of mining, in the computation of the tax permits a deduction for a number of things in the nature of expenses including "royalties" paid. The nature of the two Acts, however, and the incidence of the tax contemplated by them respectively, are so entirely different that it is difficult to base any legal theory on their correlation or to find any constitutional justification for the one in the existence of the other. The occupational tax is measured by what roughly may be called profits. But there may not be any profits although the mine is being rapidly exhausted. Mining expenses even without royalty deduction conceivably in a given case may use up the entire value of the ore mined. Such things have happened. The mine owner operating his own mine under such circumstances, therefore, pays no occupational tax and there is no compensatory royalty tax to the State for he pays no royalty. The theory of close correlation of the two Acts therefore as a basis for classification fails, for the royalty tax which the operating owner is not required to pay is not off-set or compensated for from the standpoint of the State by the denial to such owner of the royalty deduction in the computation of the occupational tax, since he pays no occupational tax. The operating owner therefore in such case pays neither tax. The prima facie discrimination between the owner leasing and the owner operating himself under the Royalty Tax Act is therefore not removed or remedied by a reference to the Occupational Tax Act.

Attention is also called to the deductions allowed in the Occupational Tax Act other than royalties paid, viz.: Amount paid for mining the ore, for removing the over-burden, for sinking of shafts, etc. (Ch. 223, Laws of Minnesota, 1921, Sec. 2). Can it be that the persons performing those services or the profits or income therefrom may be subject to a separate classification for taxation purposes because such expenditures like "royalties" are allowed as a deduction in the Occupational Tax Act? The "purpose and policy of taxation" as a basis for classification has been

carried far afield, but we submit that the relation between these two Acts is too haphazard and too uncertain in results to furnish reasonable support for the separate classification of royalties as a subject of taxation. Each Act is after all absolutely independent of the other. Either may be repealed or amended at any time without affecting the other.

We desire to call the attention of the Court also to the fact that the validity of the Minnesota occupational tax was only qualifiedly sustained by this Court.

Oliver Iron Mining Co. vs. Lord, 262 U. S. 172.

The Court said (p. 180):

> "Among the deductions which the act provides shall be made from the value of the ore before computing the tax is 'the amount of royalties paid on the ore mined and produced during the year.' This provision is assailed as working a serious discrimination in favor of those who operate under leases and pay royalties, as all the lessees do, and against owners who operate their own mines and pay no royalties. The question is an important one and has not been before the supreme court of the State. It apparently requires a construction of the particular provision along with other parts of the Act, and possibly of the State constitutional provision. After that it may be that there would be need for turning to the 14th Amendment. 'Only those whose rights are directly affected can properly question the constitutionality of a State statute and invoke our jurisdiction in respect thereto.'
>
> (Citing cases).
>
> "The record shows that of the many iron mines in the state, all but six are operated under leases, and that none of the six was operated in any way during 1921, the year in respect of which the tax was about to be imposed when these suits were begun. Therefore no tax could be imposed in respect of the six mines, based on that year's operations, and it is made plain that the defendants have no purpose to impose one. It cannot be merely assumed that mining has been resumed at those mines, nor that any tax in respect of them for later years is now threatened. The situation in these cases is therefore such that none of the plaintiffs is entitled to invoke a decision of the question. We accordingly leave it entirely open."

In other words, while the classification of all those persons engaged in the business of mining, either as owners or lessees, was held valid by the decision in the Oliver case, the question of discrimination whether *all within the class* were "dealt with according to uniform rules" or with that uniformity that the Constitution requires, was left "entirely open." The question is still open therefore whether owners who operate their own mines are subject to the Minnesota occupational tax. Without entering however into an argument of that subject, if owners operating their own mines are not subject to the occupational tax the entire framework of the argument that the Occupational Tax Act and the Royalty Tax Act are supplementary of each other and furnish a basis of constitutionality one to the other, falls to the ground. The operating mine owner is of course not included in the classification attempted to be established by the Royalty Tax Act and is not subject to that tax. It appears also that he may not be subject to the occupational tax and that the State consequently is not compensated directly or indirectly for his omission under the Royalty Tax Act. The two Acts therefore do not dove-tail together. There is a very serious discrimination under Chapter 226 in favor of the operating mine owner and *against* the non-operating mine owner who receives royalties, in that the latter pays a royalty tax and the former does not, a discrimination which is not removed by any computation under the occupation tax for the operating owner pays no occupation tax. The discrimination under Chapter 226 is *against* non-operating mine owners receiving royalty and in favor of operating owners, the reverse of the situation under the occupation tax law discussed in the Oliver Iron Mining Company case: and it is a discrimination against defendant Sargent Land Company in case at bar which plaintiffs are in a position to urge before this Court.

Nor does the Royalty Tax Act in question by any reference to its theory or policy serve to supply a basis retroactively if such a thing were possible, for the constitutionality of the Occu-

pational Tax Act. Its only effect is to compensate the State for the allowance of royalties as a deduction in the computation of the occupational tax, by taxing these same royalties in the hands of a third party, viz., the non-operating mine owners. But as between the operating lessee and the operating owner the situation under the Occupational Tax Act remains exactly the same; the discrimination against the operating owner paying no royalty discussed in the Oliver Iron Mining Company case continues under the Occupational Tax Act just the same as it did prior to the enactment of the Royalty Tax Act. The two Acts still fail to dovetail together.

But conceding for the purpose of the argument that the occupational tax may be held valid as against the objections of owners operating their own mines, it remains entirely uncertain, as before stated, whether they actually pay any such tax based as it is on profits. The Royalty Tax Act and the Occupational Tax Act are therefore at most only *contingently* supplementary to each other and the "theory and purpose of taxation" serves at most only *uncertainly* as the basis of the classification in case at bar. The Royalty Tax Act levies a tax absolutely: the Occupational Tax Act levies a tax only conditionally. The alleged complementary provision in the Occupational Tax Act permitting a deduction for royalties paid in the computation of the tax, shares necessarily the same defect of conditionality and may mean nothing. There is therefore it seems to us a very real discrimination *against* the leasing mine owner who must pay this royalty tax absolutely, and in *favor* of the operating owner who is not subject to this tax and who may not, on the other hand, pay or be required to pay directly or indirectly any other tax whatsoever as an offset or in lieu thereof. We again urge that the classification in case at bar which includes the non-operating mine owner receiving royalty and excludes the owner operating himself, both dealing with the "wasting asset" of an operating mine, is arbitrary, unfair and not founded on any differences in situa-

tion or circumstance making the taxation of the one to the exclusion of the other necessary or reasonable. No tax on the ownership of an operating mine which includes direct royalties but excludes the indirect royalties which an operating owner may appropriate to himself through his mining operations, can possibly be fair or just or based on any inherent differences from any view-point so as to bring the tax within the permissive limits of the constitution in respect of uniformity.

In these matters of uniformity and classification in respect of taxing and other Acts, we are well aware that the legislatures and courts have in recent years gone to great lengths in stretching the limitations set by the constitution.

It is submitted, however, that, if the conclusion of the trial court in this case be correct, then the constitutional provision that "taxes shall be uniform upon the same class of subjects," practically ceases to be mandatory, with the result that the constitution imposes in effect no restriction upon the power of the legislature in respect of taxation, since, by the subterfuge of dividing and sub-dividing recognized classes of taxable property, legislators may, at their election, and to gratify any whim or prejudice or unreasoned conception, create a new and valid class which may be confined in its scope to a single description of taxable property, and, in the last analysis, to the property or business of a single taxpayer.

Thus, by way of illustration, by the judgments of this court and of the Supreme Court of Minnesota, royalties from mining leases are simply *rents*,

> *von Baumbach vs. Sargent Land Co.*, 242 U. S., 503,
> *State vs. Royal Mineral Association*, 132 Minn., 232,

in no respect distinguishable from any other ground rents.

Yet the legislature has here ventured to put into a new and special class, for purposes of taxation, *rents derived from mining leases*, leaving all other "rents," as such, untaxed. Under the theory of the lower court, the legislature, if given time, may pick

out "rents" from oil stations as an additional step in its correlated scheme of covering, in a leisurely and indefinite future, all classes of rents; to be followed, perhaps, by a third enactment taxing rents of farm lands.

Another illustration even closer at hand is seen in the matter of "royalties." The Act in question here has undertaken to make a distinct and definite class of royalties derived under iron mining leases, excluding from similar taxation royalties for permission to mine, take out and remove stone from quarries, or gravel from gravel-beds, or clay suitable for the manufacture of bricks or tiles, and royalties derived from permission to cut and remove hay or standing timber, as well as royalties paid for the use of patent-rights, or the right to publish copyrighted books or music, or to reproduce paintings, drawings and similar copyrighted works. To what "class of subjects" can the constitutional restraint be applicable, if it may be ignored here? If taxing Acts such as the one in question be held valid, where are the confines of uniformity fixed by the constitution, and where are the limitations set by that instrument to individual caprice or class prejudice in the making of tax laws?

POINT III.

THE ACT IS INVALID FOR LACK OF PROPER UNIFORMITY OF TREATMENT AMONG MEMBERS OF THE SAME CLASS.

As stated earlier in this brief, "This Court is not bound by names but will determine the nature of a tax for itself," and that the nature of a tax depends "upon the mission given it by the law under which it is levied."

The learned trial judge must have had this in mind when in the court's memorandum accompanying the decision, it was said:

> "Looking through the Act, however, to the real substance thereof, it is essentially a tax upon the interest in the land owned by the person by whom the tax should be paid and it is so considered in the determination of this case. The amount of the royalty is the basis to be used in the computation of the tax" (R. 73).

In other words, it is *a property tax* on the taxpayer's interest in mineral land.

The granting words in the Sargent Company mining lease (R. 12), are "do hereby lease, demise," and said lands are "leased and demised....for the purpose of boring, digging, exploring for, mining, taking out and removing all the merchantable iron ore." The term of the lease is fifty years with exclusive possession of the premises, and with full warranty of title (R. 13).

The word "permission" as used in Chapter 226 would therefore appear to be a grant of the right of possession and profits of a parcel of land for the enjoyment of which royalty is paid.

The right to possess a parcel of land and to enjoy the profit thereof is of the very essence of ownership. They may be said to be the paramount interest in land. "What is property but the profit thereof." And the profit must rest on the use of the land from which it springs.

Hence the tax, upon this assumption, is in truth and in fact

levied on an interest in land, and the six per cent rate, and the amount of money or royalty received, are merely the yardsticks to measure the amount of the tax.

Real property for the purpose of taxation is defined as follows:

> "Real property, for the purpose of taxation, shall be construed to include the land itself, and all buildings, structures, and improvements or other fixtures of whatever kind thereon and all rights and privileges thereto belonging or in any way appertaining, and all mines, minerals, quarries, fossils, and trees on or under the same."
>
> Sec. 1972, Gen. Stat. Minn. 1913 (R. 45).

And it is declared that,

> "In assessing any tract or lot of real estate in which iron ore is known to exist the assessable value of the ore exclusive of the land in which it is located and the assessable value of the land exclusive of the ore shall be determined and set down separately and the aggregate of the two shall be assessed against the tract or lot."
>
> Sec. 1988, Gen. Stat. Minn. 1913, as amended by Chap. 140, Laws 1923: last part of paragraph, "Class I" (R. 46).

The true and full value of the right to possess and to enjoy a particular parcel of land, is, along with its mineral content, the land itself, and every other interest, for the purposes of establishing a basis upon which the ad valorem tax may be computed, ascertained *en bloc*, by orderly statutory proceedings including appraisal by assessors, hearings and equalization. This true and full value having been ascertained the provisions of said Section 1988, General Statutes, Minn., 1913, are applied to determine the assessable value of property. These provisions are in substance that iron ore shall be assessed at 50 per cent of its true and full value; city and village real estate at 40 per cent of its true and full value, and farm lands at 33 1/3 per cent of their true and full value.

Class I property which is assessed at 50 per cent of the true and full value, is, by said Section 1988, declared to be "Iron ore whether mined or unmined."

Under the system of taxation put into operation by the Minnesota Tax Commission, "Class I" mining properties are divided into two groups—"operating mines and reserves." These groups are sub-divided into six classes of operating mines and six classes of reserves and a different valuation applied to each class.

The six sub-divisions are as follows:

Class 1. Properties operated by open pit methods where mining cost is comparatively inexpensive and the ore high grade.

Class 2. Properties operated by open pit methods where mining cost is comparativley inexpensive and the ore of a lower grade.

Class 3. Properties operated by open pit or mixed methods, where mining is somewhat more difficult and mining costs greater than in the case of Classes 1 and 2, and the ore of mixed grade.

Class 4. Properties operated by underground methods, where the expense of mining is comparatively low for that kind of mining and the ore of high grade.

Class 5. Properties operated by underground methods, of distinctly second grade and determined by a higher cost of mining and lower grade of ore than in the case of Class 4.

Class 6. Properties of an inferior character to those covered in the preceding classes, operated by underground methods of mining, under high mining cost and a mixed grade of ore.

Eighth Biennial Report, Minnesota Tax Commission (1922), p. 40.

The Minnesota Tax Commission has also established as a basis for ascertaining both the true and full value and the value for assessing purposes of these several sub-classes or groups, the following rates per ton to be used as a multiplier of the tonnages of ore ascertained to be in the land subject to assessment:

Class	Rates per ton for establishing full true value.		Rates per ton for establishing the full assessed value being fifty per cent of the true value.	
	Mine Cents	Reserve Cents	Mine Cents	Reserve Cents
1	80.22	51.04	40.11	25.52
2	72.88	43.68	36.44	21.84
3	65.72	36.54	32.86	18.27
4	55.86	26.66	27.93	13.33
5	46.20	24.36	23.10	12.18
6	24.02	19.54	17.01	9.77

(Said report page 41.)

With these facts and figures in mind, let it be assumed that there are two forty acre tracts of iron ore land lying in the same taxing district; that each tract has an ascertained mineral content of 1,000,000 tons; that the assessed valuation of each tract is the same; that the tax rate for all State, County, Municipal, School and all other purposes is seventy mills; that each is classified as a sub-"Class 1" operating property; that each is under lease; that the annual minimum tonnage requirement is 100,000 tons in each; but that the royalty in one case is 25c and in the other is $1.00 per ton of ore.

The taxes which the respective owners of these properties would have to pay would be as follows:

Case No. 1.

Ad valorem tax: 1,000,000 tons at 40.11 cents makes a gross true and full assessed value of $401,100.00, which, at 70 mills tax rate, equals	$28,077.00	
Royalty tax, on annual minimum of 100,000 tons at 25 cents, or $25,000, at 6%, equals	1,500.00	$29,577.00

Case No. 2.

Ad valorem tax: as above	$28,077.00	
Royalty tax, on annual minimum of 100,000 tons at $1.00, or $100,000, at 6%, equals	6,000.00	$34,077.00

The gross tax in case No. 1 is 7.38 mills on the assessed valuation.

The gross tax in case No. 2 is 8.5 mills on the same valuation.

And the owner in case No. 2 pays an annual tax of $4,500.00 more than his neighbor on property of the same value.

Examples of this kind could be multiplied almost without limit as there are six sub-classes of the operating mines and six of the reserve body mines, and innumerable leases, with varying annual minimums and royalty rates, thus giving rise in the final analysis to gross inequalities, and arbitrary differences in treatment, in the application of Chapter 226, among members of the same class of subjects. The members of each class or sub-class are in exactly the same situation as respects the taxation of their real property.

An Act which purported to impose a tax of two per cent. in the nature of an excise tax or license on freight lines and equipment operated in the State of Minnesota was held to be a property tax and void as not being uniform with the rate imposed on other property similarly taxed. The Court saying:

> "Where the method adopted is a tax upon property based upon valuation, the rate imposed must be uniform, and apply alike to all who are thus taxed. The property of one citizen may not be taxed at a greater rate than that of another. And, however difficult it may be to obtain equalty in other respects, a uniform rate may and must be imposed in this class of taxation."
>
> *State vs. Canda Cattle Car Co.*, 85 Minn. 461.

> "Concededly the gross-earnings tax is based upon the right to tax the property out of which the earnings are derived."
>
> *State vs. Cudahy Packing Co.*, 129 Minn. 33.
>
> *State vs. United States Express Co.*, 114 Minn. 346.

The valuation in determining the basis upon which the gross earnings tax rests, is made in a different manner and upon a different basis than the ordinary valuation of land is made for the purpose of fixing the ad valorem tax. But the end reached is

the same in both cases and the rate must be uniform as to the class of subjects. In the case at bar the mine owner's property is valued and assessed pursuant to law under the rules and regulations of the Minnesota Tax Commission, and a uniform tax, as to class, levied. It does not lie in the power of the Legislature (if this purported royalty tax is in fact a tax on land) arbitrarily to throw that tax out of balance and harmony by attempting to impose an additional tax which is unequal in rate and which gives birth to gross irregularities in uniformity of application.

And right here let memory refresh itself with the words of Chief Justice White:

> "And no change in the situation here would arise, even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of taxing power, the Act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."
>
> *Brushaber vs. Union Pac. R. R. Co.,* 240 U. S., 1, 24-25.

And, further, Chapter 226 imposes "direct double taxation."

> "Such a course would result in double taxation, which is forbidden by the constitution and is not authorized by statute."
>
> *State vs. Farmers & Mechanics Savings Bank,* 114 Minn. 95 (p. 113).

It must follow, if Chapter 226 imposes a tax on real property in addition to the *ad valorem* tax, that the chapter is unconstitutional and void, as it is arbitrary, produces "gross and patent inequality," imposes direct double taxation, and lacks uniformity of application among members of the same class.

POINT IV.

THE ACT DOES NOT AND CANNOT APPLY IN ANY EVENT TO ROYALTIES FOR ORE MINED PRIOR TO JANUARY 1, 1923; NOR TO ROYALTIES DUE PRIOR TO THAT DATE THOUGH PAID AFTERWARD.

The Act in question was passed April 11, 1923, and by its terms levied a tax "upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter."

It appears in evidence in this case (R. 61) that a portion of the moneys received by defendant Sargent Land Company in 1923 and threatened to be taxed under this Act represents royalties upon ore actually mined and removed by the lessee during the calendar year 1922.

In the event the Act be held constitutional from the standpoint of uniformity and classification, there is the further question involved on this appeal whether and how far it applies or can apply to such royalties received during the year 1923 for ore mined *prior to that year.* The case being properly in this Court "all questions presented by the record whether involving Federal or State law, must be considered."

Atlantic Coast Line Ry. vs. Daughton, 262 U. S. 413.

The lower Court declined to pass on this question, stating (R. 73) "the question of what royalty receipts shall be included in the computation of the tax for 1923 is not decided. It is assumed that in the administration of the law, the Act in question will be so construed as not to offend against any constitutional provision." The question is of considerable importance not only to plaintiffs in the instant case, but also to many other contestants whose cases are pending awaiting the decision of this court in this case.

There is no doubt that an Act intended to levy a tax of an

original nature retroactively for a past period of time is unconstitutional and void. Certain States have express prohibitions in their constitutions against retroactive legislation and such taxing acts have frequently run foul of this prohibition. "The Act saddles upon him a liability as to a past transaction in regard to which he was free from liability and which could not lawfully be imposed upon him at time of the passage of the Act. To this extent it is certainly retroactive within the letter and meaning of the constitution and could not therefore be constitutionally passed."

Holliday vs. City of Atlanta, 96 Ga. 377.
New England Mortgage Co. vs. Board of Revenue, 81 Ala. 110.
State vs. Galveston Ry., 100 Tex. 153.

But even in States in which there are no express constitutional prohibitions against retroactive legislation, other than *ex post facto*, such tax legislation is held to be in violation of the "due process of law" clause of both the State and Federal Constitutions.

"The exaction by a state of a tax which it is without power to impose is a taking of property without due process of law, in violation of the Federal Constitution."

Frick vs. Commonwealth of Penn., U. S. Sup. Court, 17 Adv. Op. 692. Oct. term, 1924.
Cooley on Taxation (4th Ed.), Sec. 520.
City of Grand Rapids vs. Lake Shore Ry., 130 Mich. 238.
Weber vs. City of Detroit, 158 Mich. 149.
People vs. Union Bag Co., 118 N. Y. Sup. 456.

In a case involving the attempted taxation by the State of Kentucky of certain bank shares for one or more previous years, the Federal Court, in holding the Act unconstitutional, said:

"The court will not attempt to decide that there may not in extreme cases be a legitimate statutory enactment imposing a retroactive taxation for previous years upon a class of property not then subject to taxation at all. But it would at least be a rare case and one which would come extremely near to taking property for public use without compensation and might be most dangerous and oppressive as well as

destructive of many other established principles of the law of taxation. If the power to do this exist at all, there is no limit to it."

First National Bank vs. City of Covington, 103 Fed. 523.

The violation of "due process of law" does not of course take place when the Act is remedial in nature or is based on some previous obligation to pay the tax. It was this distinction which sustained an Act taxing lands previously escaping taxation, though subject to the tax, in the Minnesota case of

County of Redwood vs. Winona & St. Peter Ry., 40 Minn. 516, affirmed on appeal by this Court, 159 U. S. 526;

and taxing lands under-assessed in previous years.

Weyerhaeuser vs. State of Minnesota, 68 Minn. 353, affirmed on appeal by this Court, 176 U. S. 550.

In both these cases involving taxes assessed for prior years, the general rule was apparently conceded to be that the legislature in an Act levying an original tax does not have the right under the constitution to extend the tax backwards to cover a prior period of time. If the Act in question in the instant case attempted to levy a tax on royalties received in 1900, or in 1910, or in 1920, or even in 1922, it would be clearly invalid as to those years. Does the fact that the Act starts with only those royalties received in 1923 remove the unconstitutionality in this respect? If it be an excise tax, it would seem clear that the tax cannot be laid upon anything that was done, or be measured by anything that was done, *prior to the passage of the Act,* much less by anything that was done in 1922.

State of Texas vs. Galveston & Harrisburg Ry., 100 Tex. 153.

An Act passed July 5, 1905, imposing a tax on Railway Companies equal to one per cent of their gross annual receipts was held to be an excise tax measured by such gross receipts, and so much of it invalid as attempted to include in the computation of the tax the gross receipts of the Companies prior to date of passage of

Act from January 1 to July 5, 1905, the Court saying (p. 175) "if the Act in question be construed to embrace the whole of the year 1905 and entitles the State to collect the full annual tax for that year, it would confer upon the State a right against the railroads which did not exist before the law took effect, and it would impose upon each railroad a burden to which it was not liable before the law became effective."

If the tax in question be construed as an income tax, it may perhaps be conceded to tax all royalties received in 1923, otherwise taxable, including those received prior to the passage of the Act, the calendar year being considered but a single unit of time.

Brushaber vs. Union Pacific Ry., 240 U. S. 1.

But as to those royalties which, though received in 1923, were in payment of ore actually mined and removed in 1922, or previous years, they are not properly or fairly to be construed as income of the year 1923. The transactions which they represent and out of which they sprang took place in 1922 and are *closed transactions* of that year. Under the Federal Income Act they would ordinarily be treated as income of the year 1922 although paid in 1923.

If, however, the Act in question be a property tax on money, land or an interest in land—measured by these royalties, it would seem clear that this *measure* cannot be extended indefinitely into the past by the legislature. The tax is of and for the year 1923. The measure or yardstick must be of the same year and bear a reasonable relation to the thing measured. For that reason we submit that royalties received in 1923 for ore mined in 1900 or 1910 or 1920, or royalties received in 1923 for ore mined in any year previous to 1923, are beyond the constitutional power of the legislature to tax in this Act of 1923; because, in effect, whether the tax be on the royalties direct or whether the royalties only measure the tax, the thing taxed is created or controlled by conditions in existence and effective before the tax was laid and

to which the tax cannot now *be made retroactive*. Royalties as a result of ore mined previous to 1923 do not have any reasonable relation to a determination of the values of anything in 1923. Suppose a mine be exhausted by the mining operations of the year 1922, but royalties therefor not received until 1923. Is it reasonable to believe that the State has the power to tax that mine or any interest in that mine, in any form or under any name, as of its status in 1923 measured by the royalty receipts of that year, when those receipts really reflect the 1922 status and measure the 1922 value of the property, a property which in 1923 is become worthless? And if the State can so tax, can it tax a mine exhausted in 1910 or 1920, the royalties from which however were not received until 1923? As was said by the Court in the case of *First National Bank vs. City of Covington* (*supra*), "if the power to do this exist at all, there is no limit."

But we need not pursue this constitutional question further, for a proper construction of the Act we believe leads to the same practical result. This evidently was the opinion of the court below. It is elementary that statutes are not to be given a retroactive interpretation unless clearly required by the language of the Act itself.

State vs. Probate Court, 142 Minn., 283, at p. 287.

> "It may be laid down as a fundamental rule for the construction of statutes that they will be considered to have a prospective operation only, unless a legislative intent to the contrary is expressed or necessarily to be implied from the language used or the particular circumstances, especially where to construe the act as retrospective in its operation would render it obnoxious to some constitutional provision."
>
> *Stein vs. Hanson*, 99 Minn., 387, at p. 389.

This Court in the recent case of

Lewellyn vs. Frick, (Oct. Term 1924), 15 U. S. Sup. Court. Adv. Opinions 585,

in construing that provision of the so-called estates tax of the Revenue Act of 1919, which purports to tax the proceeds of life

insurance payable to a third party beneficiary, held that the Act did not apply to policies the right to the proceeds of which had vested in such beneficiaries before the passage of the statute, although not received by them until after its passage. In this case the Court used the following language:

> "We do not propose to discuss the limits of the powers of Congress in cases like the present. It is enough to point out that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick. There would be another if the provisions for the liability of beneficiaries were held to be separable, and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer. Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind. *Panama R. Co. vs. Johnson*, 264 U. S. 375. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'That laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways."

The rule has also been very well expressed in

2 Cooley Taxation, (4th ed.) Sec. 520.

"There is commonly a presumption that any new tax law was not intended to reach back and take for its standard of apportionment a state of things that may no longer be in existence. 'New burdens,' it is very justly said, 'ought always to be prospective'."

Again in the recent case of

Danser Co. vs. Gulf R. R. Co., Sup. Ct. 17 Adv. Op. 720,

this court said "all statutes are to be considered prospective unless the language is expressed to the contrary or there is a necessary implication to that effect. To give it that effect (i. e., retroactive application) would be to deprive defendant of its prop-

erty without due process of law in contravention of the 5th Amendment."

In the very recent case of

State vs. Crete Mining Co., 204 N. W. Rep. 932, 934 (July, 1925),

the Supreme Court of Minnesota held that the Minnesota Occupation Tax Act, discussed in this brief, which went into effect April 11, 1921, was not to be construed to levy an excise tax retroactively upon the business of mining which was carried on between January 1, 1921, and April 10, 1921, but which ceased after the last named date. The court did not enter into a discussion of the constitutional questions involved, but rested its decision upon a proper construction of the Act, saying:

> "There is no satisfactory evidence that the legislature intended to tax those whose mining operations were completed prior to April 11, 1921, and who did not re-engage in the business before the calendar year ended. There is no unavoidable implication of such a purpose. Full effect can be given to Chapter 223 without placing such a construction upon it. In spite of the earnestness and ability of the argument in favor of the construction advocated by the Attorney General, we are clearly of the opinion that it cannot be adopted without imputing to the legislature an intention to depart from the established policy of restricting the operation of a tax law to the future and of making the law speak prospectively and not retrospectively."

Looking to the heart of the Act in question, while the tax is laid nominally on royalties, what the Legislature intended in the last analysis to reach, in some form, was the iron ore and especially the mining of ore. "There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this State, a tax of six per cent." (Sec. 1). Whatever the tax may be, the measure of it or the extent of it was to be determined by this mining and removal of the ore or by the permission to mine which was accounted the same thing. And this fact of the mining and removal of ore mani-

festly determined also in the minds of the legislators the limits in time when the tax was to be operative.

It is therefore the real test by which to determine when the tax was to commence and when it was to end and what royalties it was to affect and what not. Applying this test it seems clear that the Act was not intended to tax royalties received for the mining and removal of ore which had already taken place prior to the calendar year 1923. The Act makes the calendar year the unit of time, and the year 1923 is the starting point. The Act speaks from that year and looks to the future, not the past. It was only therefore with the reference to the mining and removal of ore which was to take place *from that time* on, that the Legislature intended by this Act to levy, in so far as they might, this special and additional tax on royalties.

It appears in evidence also that some of the royalties threatened to be taxed in this case are advance royalties which were due in October, 1922, but not in fact paid until after January 1, 1923 (R. 61). These advance royalties are payments in advance for ore which may thereafter be mined and removed by the lessee at his option at any time. The ore was not mined prior to January 1, 1923, so far as the record shows. The Act purports to cover these cases of advance royalties under the term "permission," levying the tax whether any ore be actually mined or not: the theory being that the ore thus paid for would ultimately be mined. There would seem to be no sound distinction so far as a discussion of this tax is concerned, between ore actually mined before the Act took effect and ore fully paid for prior to that time but not mined it may be until thereafter. The lessee in the case of advance royalties becomes the equitable owner of the ore. He may remove it at any time independently of the lessor. If these advance royalties were in fact paid prior to January 1, 1923, they could not and would not be reached by the tax either under the spirit or letter of the Act; even though the ore represented by these advance royalties were not removed until after that date.

The fact then that the ore in this case may not actually be mined until after the passage of the Act is not decisive. Does the fact that the advance royalty payment which was due October 25, 1922, was not in fact paid until after the Act took effect, bring the payment within the intent and spirit of the Act? We think not. It seems to us here again that, reasonably construed with reference to the time the Act was intended to take effect and with reference to the objects and transactions intended to be covered by the Act, the tax was not intended to be laid upon an obligation such as this, past due at the time the Act took effect.

POINT V.

EVEN IF THE ACT BE VALID, MONEYS RECEIVED UNDER THE SALE-CONTRACT (EXHIBIT 2) ARE NOT TAXABLE UNDER THE TERMS OF THE ACT.

There is one question which, as respects the suits pending in this court touching the validity of Chapter 226, arises only in the instant case, under the contention of the State of Minnesota that the installment payments under the agreement, Exhibit 2, are "royalties" within the definition of Section 2 of said Chapter.

The appellants contend that, neither under the common understanding of the term, nor under its statutory definition, can the purchase price of property be considered as "royalty."

The decision of the learned trial judge affords no aid in the determination of this question. After stating that the memorandum filed in the case of *Royal Mineral Association, et al. vs. Samuel Lord, et al.* (decided by him at the same time) is adopted and made a part of this case, he adds (R. 74):

> "In addition, while technically the contract of the Sargent Land Company, on its face, may be one of sale, and amounts payable from time to time thereunder may be deferred installments of money called the purchase price, yet, having in mind the purpose and object of Chapter 226, Laws of Minnesota, 1923, *there is in substance no real distinction which can be drawn between the contract and the ordinary so-called mining lease. Both accomplish the same purpose in much the same way, and it would not do to hold that the tax under the law applies in one case and does not apply in the other case.*" (Italics are ours.)

It is respectfully suggested that this conclusion coincides neither with reason nor with authority.

The receipts of the Sargent Land Company sought to be taxed by the State of Minnesota under the provisions of Chapter 226 are of two kinds:

(1) Royalty receipts derived under contracts in the form

of mining leases similar to Exhibit 1 attached to the complaint in this action (R. 61); and

(2) Moneys received from the vendee under the contract Exhibit 2 attached to the complaint (R. 61).

If chapter 226 be held to be constitutional and valid, the appellants, as stockholders of the Sargent Company, must concede the liability of the corporation to pay the tax imposed thereunder upon its receipts of the first kind; *but they deny the power of the State to exact, under said chapter, a tax upon the payments of purchase price of ore sold, received by the company from the vendee under the contract Exhibit 2. Such payments are not "royalty," and do not fall within the embrace of the act.*

The enforced collection of a tax upon such receipts would be unconstitutional, both as an unlawful taking of private property for public use without compensation in violation of the 5th amendment, and as offending the due process provision of the 14th amendment, of the Federal Constitution.

Frick vs. Commonwealth, U. S. Sup. Ct. Decided June 1, 1925, 17 Advanced Opinions, 692-694.

The question then arises, whether, *because the purchase price of ore in place is payable in installments*, its character is changed and it becomes, *ipso facto*, "royalty"?

The position of appellants is sustained by the language of Sections 1 and 2 of Chapter 226 (R. 42-3). These sections read:

> "Section 1: There shall be levied and collected upon all royalty received during the year ended December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this State, a tax of six (6) per cent.
>
> "Sec. 2: For all purposes of this Act, the word 'royalty' shall be construed to mean the amount of money, or value of property, received by any person having any right, title or interest in or to any tract of land in this State for permission to explore, mine, take out and remove ore therefrom."

Hence, unless the money (or value of property) sought to be made the subject of the tax be received "for permission to explore, mine take out and remove ore" from land in the State of Minnesota, it does not fall within the purview of the Act.

The language of the definition is so unequivocal as respects the single subject of its application that it requires no interpretation, and permits no construction.

If the purpose and object of the Legislature in the enactment of Chapter 226 were, as assumed by the trial judge, to reach all moneys derived from the ownership of iron ore or of any interest therein, in whatever form received (which assumption there is nothing in the Act itself to support), it is apparent from its language, which is clear and unambiguous, that such purpose and object were not accomplished. The multiple scheme of taxation existing in the minds of successive legislatures, recited in the main opinion of the Court (R. 70, 72), finds no foundation in the record; but, if it did, it would present a conclusive argument against the expressed view of the Court that "it would not do to hold that the tax under the law applies in one case (mining leases) and does not apply in the other case (Exhibit 2)." Until the Legislature in specific terms imposes a tax upon any class of property or of property rights, none can be levied upon or enforced against the same. Chapter 223 of the Laws of 1921 imposed a tax upon the occupation of mining, but it was not until the enactment of Chapter 226 of the Laws of 1923 that "royalties" could be reached, and until then that particular "interest in mineral lands" escaped the grasp of the tax gatherer. It would require a far slighter stretch of interpretative logic to embrace "royalties" under Chapter 223, "An Act providing for the imposition of a tax upon persons * * engaged in the business of mining or producing iron ore," than is required to subject purchase price of ore sold to the burden of an Act taxing royalties,—especially in view of the emphatic distinction which the Minnesota Court has made between mining leases and sales of ore,

between royalties (or rents) and purchase price of ores. If, in its wisdom, and in the further endeavor to carry out the imaginary scheme of taxation referred to, some future Legislature shall see fit to enact a law taxing proceeds of sales of minerals or mineral lands, it may result that vendors under contracts of the nature of Exhibit 2 will be subject to the additional tax burden; but until such time, such installments of purchase price will be free from a discriminatory tax which is not imposed upon other moneys and credits.

If payments of purchase price of the ore sold by the Sargent Land Company under and by virtue of the contract Exhibit 2 be not a consideration for "*permission* to explore, mine, take out and remove ore" from the lands therein described, the law is inoperative in respect of such payments quite as much as it would be in respect of payments of interest or principal upon bonds or other securities, or purchase price received by the corporation from the sale of personal property or non-mineral-bearing lands.

WHAT IS "ROYALTY"?

The word "royalty" is of ancient origin, and has always had a well-defined and distinctly limited meaning, both historically and by common usage.

Historically, under the old common law, as one branch of the royal revenue, mines of gold or silver, and mines of base metals containing gold or silver, were called "royal mines," from the King's prerogative of coinage, in order to supply him with materials therefor,—and the products of such mines were "royalties." Later, this was modified by statute as respects base metal mines, the King being entitled to the ore only upon payment therefor, at a price fixed by the law.

1 *Blackstone's Comm.*, 294.

So, too, with coal and other valuable minerals found on crown lands. They might be mined and removed in consideration of the payment of a stated "royalty" per ton, or other measure.

In *Webster's New International Dictionary,* we find the following definitions of "royalty":

"(a) Any of the royal rights constituting the *regalia,* including various rights in land, such as the right to all gold and silver mines, called 'royal mines'; hence, a percentage paid to the crown of gold or silver taken from mines, or a tax exacted in lieu of such share.

(b) A share of the product or profit (as of a mine, forest, etc.) reserved by *the owner* for permitting another to use the property.

"(c) A duty or compensation paid to *the owner* of a patent, or a copyright, for the use of it . . . ; also

"(d) A percentage, as an output, paid to *the owner* of an article, especially a machine, by one who hires the use of it."

With the exception of the definition (a) above quoted, these various classes of royalty are recognized and are in common employment in this country.

In the *New Standard Dictionary,* the following definitions are given:

"A share of proceeds paid to *a proprietor* by those who are allowed to develop or use property, or operate under some right *belonging to him, as the owner* of mining lands for ore taken out, to *the owner* of a copyright for books published and sold, or to *the owner* of a patent for articles manufactured and disposed of thereunder; a use originating in the meaning defined below.

"A tax or seigniorage paid to the crown, as on the produce of royal mines or lands for the right of working them, or on gold and silver coinage."

So, in the *New Oxford English Dictionary,* definitions as follows occur:

"A royal prerogative or right, especially in respect of jurisdiction granted by *a sovereign* to an individual or corporation.

"pl. In later use chiefly denoting rights over minerals.

"A payment made to *the landowner* by *the lessee* of a mine in return for the privilege of working it.

"A sum paid to *the proprietor* of a patented invention for the use of it.

"A payment made to an author, editor or composer for each copy of a book, piece of music, etc., sold by the publisher, or for the representation of a play."

The Century Dictionary speaks of "royalty" as

"(1) A royal due or perquisite; especially a seigniorage due to a King from a manor of which he is lord;

"(2) A tax paid to the crown, or to a superior representing the crown, as on the produce of a royal mine.

"(3) A compensation paid to *one who holds a patent* for the use of the patent, or for the right to act under it, generally at a certain rate for each article manufactured.

"(4) A proportional payment made on sales, as to an author or inventor for each copy of a work, or for each article sold."

In

Indian Natural Gas & Oil Co. vs. Stewart, 44 Ind. App., 554; 90 N. E., 384,

the action was brought by a lessor of mining property to recover annual rents or royalties agreed to be paid by the lessee. There was a clause in the lease reading as follows:

"(7) Second party may at any time re-convey this grant, and thereupon this instrument shall be null and void. A well shall be drilled within two years from this date, or the royalty paid to first party."

Two years had elapsed after the execution of the lease, and no well had been put down; the contract was still in force and the lessee had failed to pay the annual royalty specified in the lease. The court held that the plaintiff was entitled to recover and in the course of its opinion used this defining language:

"The word 'royalty,' found in the seventh clause, generally has reference to a share of the product or profit reserved by *the owner* for permitting another to use the property."

Permission to use, hire, explore, remove, dispose of, transform or destroy property of any sort can only be given to a stranger to the title *by the owner* of the property or right affected. One who

has no property interest in land or chattels can give no valuable or valid "permission" respecting the same.

On the other hand, the owner can so employ, or act toward his property, *without permission from any one* and without restriction, save as he may be limited in his action by police regulations of the State.

The controlling word in the definition of royalty as found in Chapter 226 is the word "permission," for *royalty* is merely the consideration for *permission* to exercise or to enjoy some power or privilege respecting the property of another, or a desired right controlled by another. Such power or privilege is not a natural or legal right, else it could be exercised or enjoyed without permission. It is dependent upon the consent of *the owner* of the property or desired right, who himself needs no permission respecting what he does or refrains from doing with his own.

The concurrence of all of the authorities above quoted in the statement that royalty is a payment to *the owner* (or proprietor) for permission to use or appropriate a given property or right, is manifestly not a mere coincidence. Ownership *by the payee* of the right or privilege for which royalty is paid is an essential element in the definition.

The title of Chapter 226 reveals distinctly a similar legislative understanding of the nature of iron ore royalties (to-wit, that they are moneys paid to *the owner* of iron properties or mining rights by lessees thereof), and indicates the legislative purpose in the enactment of the Act to be the taxation of such receipts only. The Act is entitled, "An Act providing for the levy and collection of a tax on royalty *received by the owner* of any right, title or interest in land situate in this State, for permission to explore, mine, take out and remove ore from the same."

In like manner, the last sentence of Section 5 of the Act reflects the same distinct understanding. The sentence referred to reads as follows:

"A person *sub*-letting land for the use of which he received (receives) royalty shall be required to pay taxes only on the difference between the amount of royalty paid *by him* and the amount received."

Carelessly as this sentence is worded, its meaning is sufficiently obvious, namely: That a lessee or licensee possessing the right to explore, mine, take out and remove ore from lands in Minnesota, who sub-lets his right to another in consideration of an increased royalty, shall be required to pay taxes only on the difference between the amount of royalty paid by him (as such lessee or licensee) to the fee owner and the amount received by him from his sub-lessee.

The clause impliedly, if not directly, assumes and recognizes that "royalty" represents money paid *to the owner* of the mineral property, or (in the case of a sub-letting) of a mining right therein derived from such owner.

Hence, if the vendee under Exhibit 2 be the owner of the ore, his mining and removing of the ore is done by virtue of his ownership, and not by reason of permission from the former owner who has parted with his proprietary interest therein; and it follows that the payments made by the vendee under Exhibit 2 are not "royalties" within the definition of Chapter 226, because (a) they are not paid to *the owner* of the ore for permission from him to mine the same; and (b) they are, by the clear terms of the contract, installments of the purchase price of the ore,—the consideration for the transfer thereof to the vendee, who can thereupon exercise, without seeking permission from anyone, such powers and rights of dominion as inhere in proprietorship, including the right to do nothing at all, and, if he so elect, to pass the title on to another.

Thus, in

Girard Trust Company vs. McCaughn, 3 Fed. (2d), 618.

"What was the 'interest' which (before the grant) the grantor had in the real estate premises? Her 'interest' or

estate was in fee simple, the full and absolute ownership. This gave her several rights of property. One was to possess and enjoy the physical premises for life or as long as she chose; another was to part with her ownership for a consideration if she so chose; another was to pledge it for a loan, and still another was to transmit it to her heirs or to devise it to whom she chose. All of these rights, except only the first, she granted absolutely and irrevocably to another. The grant was not *in futuro*, but *in presenti*. What she granted was real estate. This is not a thing, but a right, interest, or estate in land, and what has become so far incorporated with land as to be a part of it. The possession and enjoyment of this estate or interest was immediate, and not postponed to the time of death of the grantor, because admittedly the estate conveyed was a vested interest.

"These distinctions are so well known, and indeed so obvious, that they must have been in the legislative mind. The thought at once obtrudes that if Congress had meant that for which the defendant contends, it could have been and would have been unmistakably expressed."

Our contention is again illustrated by the case of

Light & Thorium Co. vs. Alexander, 80 S. C., 10.

This was an action for specific performance of a contract whereby the defendant "agrees to sell to said English, by good and sufficient deed, with the usual covenants of warranty, free of all incumbrances, the mineral and mining rights of" described lands. The contract also provided:

"The said English agrees to buy the said mineral and mining rights, and to pay for the same upon the delivery of said deed. *Pending the execution and delivery of the said deed to* said English, said Alexander agrees *to permit* said English to take and remove from said lands such monazite sand as he may mine thereon."

Presumably, although it is not stated, the plaintiff acquired the rights of English under said agreement. The opinion states:

"The first question that will be considered is whether the agreement conferred upon the plaintiff a mere license subject to be revoked at any time by the defendant. Alexander agreed to *sell* to English, by good and sufficient *deed*, with the usual covenants of *warranty*, free of all *encumbrances*,

the *mineral* and *mining rights* of his land. English agreed to *buy* and *pay* for those rights upon the delivery of the *deed*. It will be observed that the language in the first and second clauses is quite different from that in the third clause in which Alexander agreed, *pending* the delivery of the deed, to *permit* English to remove the monazite sand from the land." (The italics are the Court's).

The opinion continues:

"The words which we have italicized are inconsistent with a revocable license and show that, if the executory agreement is carried into effect by the execution of a deed, it will confer upon the plaintiff an interest in the land itself which could be assigned."

The distinction which the Court recognized and emphasized between the situation of the parties prior to and after the actual delivery of the deed contemplated by the contract, is well shown. *While the defendant retained title to the minerals, he could grant permission to plaintiff to remove sand; but, as soon as the title passed to plaintiff, the latter's right of removal existed by virtue of his ownership, and no longer by reason of the permit.*

As a consequence, we are not concerned at the moment with the constitutionality of the act as respects the legislative power to impose a tax on the particular kind of royalties described in Chapter 226. The immediate question is: *Can that tax, if valid, be applied to and enforced against the purchase price of ore sold?*

It is not asserted by the State that royalties paid for (a) the use of a patent; or (b) for the publication and sale of copyrighted books, maps, pictures, music, etc.; or (c) those derived from the use of machines and mechanical devices (such as telephones, typesetting machines, etc.); or (d) even royalties paid for permission to cut and remove timber, or to excavate and remove stone from quarries, or gravel from gravel-beds, are subject to the "royalty tax" attempted to be created by Chapter 226. This fact emphasizes the pronounced limitation upon the scope of that Act, and the clear intention of the legislature to restrict its application

solely to moneys received by the owner of ore lands in the State of Minnesota, for the grant of "permission to explore, mine, take out and remove ore" from such lands.

The case is one, therefore, falling within the familiar principle applied by this court in

Gould vs. Gould, 245 U. S., 151, 153,

to the effect that a tax law cannot be extended beyond the clear import of the language used, or be enlarged so as to embrace matters not specifically pointed out; and that, in case of doubt, it must be construed most strongly against the government and in favor of the taxpayer.

We are brought, then, to a consideration of the terms of Exhibit 2, and a determination of the actual character of that instrument; for, if it be not a permit "to explore, mine, take out and remove ore," the moneys paid and received thereunder are unaffected by the provisions of Chapter 226.

THE CONTRACT FOR SALE OF ORE.

(Exhibit 2, Record 23.)

As has been stated, *it is the contention of appellants that, even if Chapter 226 be held valid and operative upon royalties derived under mining leases, payments received by Sargent Land Company under Exhibit 2, being the purchase price of ore sold under an express contract of sale, are not subject to the tax initiated by said Act.*

In sub-division 7 of the complaint (R. 3), it is alleged that the Sargent Land Company has *sold* to a certain vendee, the iron ore in, under or upon a portion of its lands, and that the moneys paid to the corporation under the terms of the agreement of sale (Exhibit 2, R. 23) are not, and were not at any time, *royalties* received by the corporation for permission to explore, mine, take out and remove ore from said land, but were and are the agreed

purchase price, or installments thereof, paid by the vendee in said sale-agreement for the ore therein described.

The execution of the agreement of sale; that Exhibit 2 is a true copy thereof, and that substantial amounts of money have been received by the Sargent Land Company by way of payments made to it *"under the provisions of said agreement,"* are stipulated as facts in the case. (See paragraph 11 of Stipulated Facts, R. 61). No other proof was offered or received upon the trial of the case with reference to these facts.

"The provisions of said agreement" are as direct and conclusive as language can express that such payments are "installments of purchase price" and not royalties, or rents. Unless the Court ignores the agreement as to this fact, the decree appealed from must be modified.

Moreover, examination of Exhibit 2 discloses:

(a) That it is an agreement containing all of the elements of a sale and transfer of the ore, with the usual covenants of warranty of good title and quiet enjoyment;

(b) That it contains none of the recognized and essential provisions of a lease, a license or a permit.

In respect of the former, the terse statement of the Supreme Court of Virginia, in a suit where an instrument purporting to convey all the iron ore on certain lands was claimed to pass only a license to mine, but was held by the Court to be a contract of sale, is apposite:

Morison vs. American Ass'n., 110 Va., 91.

The exact language of the conveyance is not quoted in the report, but the opinion recites:

> "The conveyance in question contained all of the necessary elements of a valid deed—competent parties, a lawful subject matter, a valuable consideration, apt words of conveyance, and proper execution. It sells, without reservation, all the iron ore in question to Reuben Rose, his heirs and assigns forever."

DETAILED PROVISIONS OF EXHIBIT 2.

If now we examine Exhibit 2 in detail, we find:

(1) That the agreement was entered into January 1, 1918, more than five years before the enactment of Chapter 226 of the Laws of 1923, hence, obviously, without any purpose to circumvent its provisions.

(2) That the Sargent Land Company, from the initial recital to the end of the agreement, whenever referred to, is spoken of as the "vendor"; and in like manner the purchaser of the ore in every instance is referred to as "vendee."

(3) That, by Article II of the agreement,

"In consideration of the sum of one dollar ($1.00), to it in hand paid by the vendee, the receipt of which is hereby acknowledged, and in further consideration of the payments by the vendee, in the installments herein specified, of *the purchase price of said iron ore*, and in consideration of the covenants, agreements and conditions herein expressed to be kept and performed by the vendee, *the vendor hereby sells to the vendee all of the iron ore* in, under or upon the lands above described, and every part thereof" (R. 24).

(4) That the vendor further gives and grants to the vendee the right to enter upon said lands for the purpose of exploring for, mining and removing said iron ore, with full right and authority to construct all buildings and to lay and maintain pipes for the conveyance of water. to make all excavations, openings, roads and other improvements for mining, removing and washing said ore (R. 24).

This clause is neither necessary nor controlling as respects the interpretation of the contract, since, by the sale of the ore to the vendee, the right of access thereto became and is an incident of the vendee's ownership, without which such ownership would be valueless; the right of entry is implied in the grant of ore itself.

So it was held in

Pine Tree Lumber Co. vs. McKinley, 83 Minn., 419,

where an owner of two parcels of land conveyed to the plaintiff all of the pine timber standing on one of them. The tract so conveyed was surrounded by the lands of the defendant and of third parties, and was inaccessible, except

by passing over some part of such lands. Plaintiff thereupon constructed a logging road over the defendant's land. The court said in this connection:

"Now the grant to the plaintiff included whatever was reasonably necessary to make it effective, and it is clear that, unless the plaintiff can pass over tract one to get to and remove the pine on tract two, the grant cannot be made available. Therefore the grant of the timber and the right to enter and remove it carried with it by implication a way over tract one for that purpose; that is, a way of necessity."

In

Moore vs. Indian Camp Coal Co., 75 Ohio St., 493,

the Coal Company had received a grant from the fee owner of all the coal in and under certain tracts of land. The fact that the instrument of grant was a conveyance and not a lease was not in issue. The question in dispute was the right of the Coal Company to use the portions of the land from which it had removed coal in underground operations for transporting coal mined from other portions of the vein or bed which had been granted to it. The Court said:

"This Court has several times recognized and applied the doctrine that there may be a complete severance of the ownership of the surface of land from the ownership of the different strata of mineral which may underlie the surface, and that the creation of a separate interest in the mineral, with the right to remove the same, whether by deed, grant, lease, reservation, or exception, unless expressly restricted, confers upon the owner of the mineral a fee simple estate, which is, of course, determinable upon the exhaustion of the mine. The grant of such an estate in the mineral, in whatever form, *necessarily implies the right* to use or remove such portions of the containing strata as may be necessary or proper for the convenient and proper removal of the mineral itself, having regard, at the same time, to the right of the surface owner to subjacent support." (Italics are ours.)

In

Pine County vs. Tozer, 56 Minn., 288, 293,

with reference to certain contracts selling to the vendees the pine timber upon certain lands, to be removed within a specified time, the court said:

"They also secured the very valuable right or privilege to cut and remove this timber about as they chose, for long periods of time, *including such possession of the land as was incidental and necessary to a proper execution of this right or permit.*"

And in

Mathews vs. Mulvey, 38 Minn., 342, 344,

the Court said:

"In this, the contract must be construed as a present, executed sale of all the timber, vesting the title at once in the grantee. If nothing had been said in the contract as to the time within which the timber should be cut, *there would have passed, by implication, a right to enter on the land and cut and remove the timber, certainly for a reasonable time.*"

(5) That, by Article III of the agreement, the vendor expressly warrants and defends the title of said lands and minerals, and will protect the vendee in the peaceable and quiet possession of said lands until the termination of the contract (R. 24-5).

(6) That by Article IV of the agreement,

"*The vendee expressly agrees * * * to buy, and does hereby buy*, all of the iron ore upon said described lands" (R. 25, subd. 1).

(7) That the vendee agrees to pay to the vendor for said ore, as follows: For each gross ton of dried iron ore carrying 49% or more of metallic iron, 75c per ton; and for each gross ton of dried ore carrying less than 49% of metallic iron, 50c per ton (R. 25 (a)).

(8) That the vendee expressly agrees, as one of the conditions of the contract to be strictly observed and performed by it, that it will mine, during the years 1918 and 1919, a sufficient quantity of ore to yield to the vendor in each of said years, "*as a minimum installment on account of the purchase price of the said ores*, at least the sum of $75,000.00; and during the calendar year 1920, and during each and every calendar year thereafter while this contract shall remain in force, such a quantity of iron ore as will yield to the vendor in each calendar year, *as a minimum installment on account of the purchase price of said ore*, at least the sum of $150,000.00."

(9) That it is further expressly agreed by the parties "that one of the considerations and conditions of the contract, without which it would not be made by the vendor, is, that such *respective installments of purchase price of said ore* shall be paid by the vendee during each calendar year while this contract remains in force, whether iron ore of that value be mined and shipped by the vendee in any such year or not" (R. 26).

(10) That the vendee is given until December 31, 1967, in which to mine and remove the ore purchased by it (R. 24), but, for the mutual protection of the parties, the agreement expressly provides (sub-division 4, Article IV, R. 26) that an estimate shall be made, ten years prior to December 31, 1967, of the quantity of ore then in place or in stockpile not yet paid for by the vendee, and that the *annual installments of purchase price* to be paid by the vendee during each of said last ten years shall be an amount equal to one-tenth of the value of such ore as so estimated, at the prices per ton above stated. For the purpose of deriving information upon which to base such estimate, the vendor may require explorations to be begun by the vendee at any time after January 1, 1953 (sub-division 6, Article XIII, R. 36-7). For the protection of the vendee, it is further provided that it shall not be required to pay for more ore during the last ten years than the mine contains; and that, in case it develops at any time that the ore body is less than estimated, and that the minimum installments then paid equal or exceed *the purchase price of all of said ore,* no further minimum annual payments shall be required, and the excess, if any, already paid by the vendee shall be repaid by the vendor (sub-division 4, Article IV, R. 26).

(11) That, for the further protection of the vendee, in case *all of the ore shall be paid for* before it shall be mined or shipped from the lands, then, at the election of the vendee, the term of the contract shall be extended for such period as the vendee may desire, in order to permit the mining and shipment of the ore so paid for (Article XV, R. 38).

(12) That the *annual installments of purchase price* shall be met by the vendee either by way of payments for iron ore actually mined and shipped from the land in the year in which the payments shall become due, or by payments in advance of mining and shipping, or by both such forms of

payment; and any ore paid for by the vendee in advance of mining and shipping the same may thereafter be mined and shipped by the vendee without further payment therefor (sub-division 5, Article IV, R. 26).

(13) That if the minimum installments of purchase price be promptly met, the vendee will not be required to mine and ship ore in any year if, in its judgment, it will be wise to suspend operations from time to time, or from year to year (R. 27).

(14) That the vendee specifically agrees to pay all taxes and assessments levied or assessed upon or against the described lands, and upon the iron ore mined by it therefrom (R. 33).

(15) That the contract provides that

"The title to the ore *hereby sold to the vendee* shall be and remain in the vendor, as security for the performance of this contract by the vendee, until *the purchase price of such ore*, as shall be mined and shipped from said land, or mined, treated and shipped, and taxes, and all other payments accruing and due hereunder shall have been fully paid" (R. 34).

This provision is a common one in contracts of sale of property of every kind, and, of course, does not alter the effect of the agreement, the situation of the parties not being otherwise than it would have been if the vendee had given back a purchase money mortgage to the vendor, to secure the unpaid purchase price.

Pine County vs. Tozer, 56 Minn., 288, 293.

In that case a railway company granted, bargained, sold and transferred to the defendants all of the pine timber upon certain lands in Minnesota, with the right to enter thereon and cut and remove the same at any time prior to a date named. Until the purchase price was paid, title to the timber was to remain in the railway company. The principal value of the land consisted in the timber thereon.

Pine County assessed a tax against the defendants based upon the value of the timber, upon the theory that the de-

fendants were the owners thereof. They contended, among other things, that their agreement constituted a mere license to enter upon the land and cut the timber, and to sustain this contention relied upon the clause of the contract referred to, retaining title to the timber in the vendor until the purchase price was paid.

The court held that the defendants were not mere licensees, but that they had acquired property rights in the timber of which they could not be divested without their consent, and, in respect of the particular defense mentioned, said:

"That the title thereto was to remain in the railway company until the purchase price was fully paid, did not affect the right or interest which they (defendants) had obtained."

(16) That the vendee is given until December 31, 1967, to remove the ore bought by him (R. 24, 26).

This limitation of time does not affect the nature of the contract entered into between the parties. In terms, it is a sale of the ore and nothing else. Until the arrival of the date named, the clause limiting the time within which the vendee may remove the ore lies dormant. If any ore remain on the premises thereafter, the limitation might operate to divest the estate of the vendee therein, or to leave it unavailable for further enjoyment by the vendee.

In

King vs. Merriman, 38 Minn., 47.

a suit involving a limited license to enter and cut timber during two logging seasons, the opinion written by *Judge Mitchell* said:

"Contracts relating to an interest in standing timber, with an express limitation as to the time of removal, are familiar to the American courts in the timbered states. Sometimes these contracts are in the form of conveyances of timber; sometimes of a sale coupled with a license to enter; sometimes of a formal license to enter and cut, and again of a

reservation of the timber by the grantor in a conveyance of the land. But, whatever the form, the limitation as to the time of removal has been almost invariably held to be a limitation of the grant or reservation itself. The reasons are manifest. *Any other construction would be against the express intention of the parties.*"

In

Mathews vs. Mulvey, 38 Minn., 342,

involving a contract of sale of all the pine timber on certain lands, with a conditional limitation that the vendee was to have as long as he wished to cut the same, provided he paid the taxes on the land, the Court said:

"*When this right should expire, the practical effect would be to divest the right in the timber,* or at any rate to leave it a barren and unavailable right, for, as the Court said in the case referred to, *King vs. Merriman,* 38 Minn. 47, 'it would be an anomaly in the law that one man should own standing timber on the land of another, with no right of entry to cut and take it away.' As the title to the whole of the timber passed at once on the execution of the contracts, *the limitation as to the right to cut is in the nature of a condition subsequent for defeating the vested title.*"

In

Kingsley vs. Hillside Coal & Iron Co., 144 Pa. St., 613,

involving a contract which the Court construed to be a sale of all of the coal underlying certain premises, and not a lease or license to remove the same, we find the following:

"Where a fair interpretation of the written agreement shows that a sale was intended by the parties, and a right to mine and remove all of the coal is conferred by it in express terms, or by plain and necessary implication, it will constitute a sale, *notwithstanding a term is created within which the coal is to be taken out.*"

In

Hope's Appeal, 29 Wkly Notes of Cases, 365,

as recited in the opinion in *Denniston vs. Haddock,* 200 Pa. St. 426,

"The agreement, though called a 'lease,' was a purchase of the ore at a fixed price per acre, making a limited gross sum, *which was payable absolutely in installments ending within* 13 *years,*"

it was held that the instrument was a contract of sale and should be construed in accordance with the principles governing such an agreement. The decision was affirmed, without opinion, by the Supreme Court of Pennsylvania, in 3 Atl. 23.

In

In re Lazarus' Estate, 145 Pa. St. 1,

a lease of certain lands provided that the lessees should have all the coal underlying the lands for the term of 99 years. The lessees were to mine a specified minimum number of tons of coal each year, and to pay so much a ton therefor, until all of the available coal was removed; and the said minimum number of tons was to be paid for annually, whether mined or not; the lessees were to pay also all taxes, imposts or excises laid upon the coal, or in any manner connected with the mining operations. The court held that this was an absolute sale of the coal, conditioned on its being removed. The question seems to have arisen as to the nature of the contract, growing out of the fact that payments for the coal were to be made in annual installments. The court said:

"It is obviously immaterial that in Hope's Appeal the consideration is payable *in solido,* while here the consideration, beyond the stipulated sum payable in any event, is regulated according to the rate per ton for the coal which may be mined; *for this is simply a difference in the mode of payment of such consideration.* Nor is it material that no coal has been nor may be mined within the term specified. The grantee has the absolute and exclusive right, under the conveyance, to mine all the available coal contained in the tract described; and it rests with him alone whether or not there shall be a reversion. If he should exercise his right within the term, the coal will by severance have become absolutely his, and his grantor will have received its equivalent in cash,

as in the case of an ordinary sale; *if not, his inaction will simply amount to a voluntary forfeiture of such rights.*"

Fifty years is a long time, and many unforseen conditions may develop which, conceivably, may render impracticable, if not impossible, the fulfillment of the contract as originally contemplated. Accordingly, Exhibit 2 provides,

(17) That at any time prior to January 1, 1958, the vendee may, upon six months' notice to that effect, terminate the contract, provided that all of its terms and conditions obligatory upon the vendee have been observed and performed up to the time of such termination (R. 38).

This, however, is a condition subsequent which in no wise affects the character of the transaction between the parties, until and unless the vendee shall exercise the privilge thus given to it.

Mathews vs. Mulvey, 38 Minn., 342, *supra.*

Reservation of right of termination by either party does not change the present status of the grantee; the execution and delivery of Exhibit 2 vested in it the title to the iron ore absolutely and immediately, subject to a limitation, not a conditional estate, but an estate *in fee* subject to divestiture upon the happening of an uncertain event which has not yet occurred.

Frick vs. Lewellyn, 298 Fed., 803, 810.

The portions of the sale-agreement not hereinbefore referred to, for the most part, are what may be called administrative provisions, [illegible]fine the methods that shall be employed by the vendee in exploration, and in mining and removing ore, stockpiling the same, sampling, analyzing, beneficiating, shipping, weighing, etc., with express provisions relating to the preparation, and submission to the vendor for approval, of mining plans, and the transmission to the vendor of reports of operations. All of

the requirements of these portions of the agreement are essential to insure the production of the largest quantity of merchantable ore from the premises, the prevention of waste and the proper conservation of the ore deposit for future recovery in case of the termination of the agreement.

Because all of the land had not been fully explored, the quantity of ore existing on the premises described in the contract of sale, and the aggregate purchase price thereof, were not stated therein; and, those matters not being issues in the case, no proof or stipulation respecting the subject appears in the record. It may be assumed, however, from the figures that do appear in the agreement, to-wit, a term of fifty years in which to mine and remove the ore, and annual installments after the first two years of not less than $150,000.00 each, that the mineral deposit is a very extensive one, and that the question of the taxability of the installment payments of purchase price, under Chapter 226 of the laws of 1923, is one involving very substantial sums.

As has been intimated to the court, Chapter 226 is an unusual, if not an unique Act. As far as a studied use of language can effect the legislative purpose, the operation of the act is strictly confined to royalties received by a taxpayer "for permission to explore, mine, take out and remove ore from land" in Minnesota.

That the mining and removal by *a fee owner* of his own ore does not subject him, in any way, directly or indirectly, to taxation under the provisions of Chapter 226, is not asserted by anyone.

Again, no claim is advanced that the proceeds of a sale of ore in place, where the full purchase price is paid in a lump sum, are taxable under Chapter 226. Such a case existed in the sale by the Sargent Land Company, in September, 1923, of one of its mines for a money consideration then paid by the purchaser (Stipulation of Facts, R. 61), and no attempt, or assertion of

a right, to levy or collect a royalty tax upon any portion of the purchase price thereof has been made by the State of Minnesota, or by any of its officials.

How, then, can such tax be enforced against the purchase price when paid in installments? Manifestly, it cannot be.

In re Lazarus' Estate, 145 Pa., 1, *supra,* p. 68.

Section 2 of Chapter 223 of the laws of 1921 (the occupation tax law) provides that the valuation of ores for the purpose of determining the amount of tax to be paid (the value of ore mined being the measure of the tax) shall be ascertained by *subtracting* among other things, *from the value of the ore where it is brought to the surface "the amount of royalties paid on the ore mined or produced during the year";* yet, though insisting that payments made by a vendee under Exhibit 2 and similar outstanding contracts are "royalties" subject to taxation under Chapter 226 of the laws of 1923, *the appellees refuse to recognize and allow them as deductions, in the nature of "royalties," in determining the measure of the "occupation-tax" liability of such vendee under said Chapter 223.* For the purposes of the occupation-tax law, such payments are considered to be installments of purchase price which cannot be deducted in ascertaining the measure of the occupation tax.

The question then is: Is the contract, Exhibit 2, *in law,* what it is in form and in fact, namely, a contract of sale vesting in the vendee the title to the ore described?

INTENTION OF PARTIES MUST PREVAIL.

That *the purpose of the parties* was to effect the sale and transfer from the vendor to the vendee of the ore is beyond controversy, and up to this time no one has asserted otherwise. There is not a syllable in the contract, from beginning to end, to sustain the contention that the instrument is to be construed as if it were an

ordinary mining lease; hence, if it be so construed by this court, it must be by reason of some principle of law which has not as yet been pointed out.

That an owner of lands containing mineral deposits can separate the ownership of the surface and the minerals by a conveyance of the one or the other, or by a reservation to himself, in a sale of the portion not sold, is well settled.

State vs. Evans, 99 Minn., 220, 225-6.
Washburn vs. Gregory, 125 Minn., 491, 493.

That is what was done in the instance under consideration. While retaining the title to the surface of the land, the Sargent Land Company sold and disposed of the mineral deposits underlying it, and vested the title to the same in its vendee. To this extent, then, the transaction was not in any respect unusual, and, after the execution and delivery of the agreement, Exhibit 2, each party owned in severalty an estate in the described lands, and each was at liberty to use and enjoy, as it saw fit, the particular property-interest belonging to it.

CONCERNING MINING LEASES.

It is the doctrine of the courts of Minnesota, as of this Court, that a mining lease, in the common form, is a lease in fact, as well as in name, and that royalties payable thereunder, on account of ore mined and removed from the lands covered by the lease, are rents, of a similar nature to those defined under ordinary land leases.

State vs. Evans, 99 Minn., 220.
von Baumbach vs. Sargent Land Co., 242 U. S., 503.

This conclusion has not been reached without a great deal of legal doubt and some hesitation, and, perhaps also, not without some regard to what were deemed necessities of the situation, as in the *Evans case* above cited. Mining leases had their origin under the technicalities of the English common law, and the

ingenuity of the common law judges was well nigh exhausted in endeavoring to demonstrate that, under a wasting lease of that kind, minerals removed from the land constituted merely the usufruct of the occupation of the land by the lessee. When the English colonists came to this country, they brought with them the more or less familiar forms of contracts which had obtained in the mother-land, and, without consideration of the illogical reasoning that led to the conclusion referred to, these forms were adopted and have persisted in the United States wherever mineral developments have occurred. But the subtle refinements that were required to distinguish between the rights of the respective parties, and of tenants for life or for years, and of remaindermen, dependent upon the condition of the property at the time such leases were made, simply resulted, as necessarily they must, in creating a state of profound confusion. Thus, the distinctions that were laid down between leases covering lands upon which mines were already opened, and those of lands containing mineral which had never been developed as mines, and the discrimination that was solemnly made between the letting of land "with the mines," and the instances where those words were omitted, simply eventuated in absurdities.

A departure, therefore, in explicit terms, from these archaic forms is not only reasonable but desirable, and the Sargent Land Company and other fee owners, some ten or fifteen years ago, determined to frame their contracts accordingly. It therefore seems extraordinary that their clear intentions may be disregarded, and that they be held to restrictions imposed by the antiquated reasoning of several generations of common law judges in respect of agreements of an entirely different character and purport.

It is a matter of common knowledge that the usual mode of recovering iron ore in Minnesota is by operators working under mining leases.

Oliver Iron Mining Co. vs. Lord, 262 U. S., 172, 180-1.

It appears from the agreed statement of facts in the case at bar (R. 63) that in the year 1923 there were in the State of Minnesota 120 iron mines operated by lessees, and 4 mines operated by their owners.

In practical effect (though, as we have seen, the technical legal construction is to the contrary) the removal of ore under a mining lease is essentially a sale, the land being worth nothing after the ore is exhausted by reason of the caving of the surface (the chief value of the lands here involved is in the deposits of ore thereon, R. 60, subd. 5); and royalties paid thereunder constitute (in practical effect), so far as the fee owner is concerned, installments of purchase price of the ore. An agreement of sale, therefore, far more accurately expresses the essence of the transaction than can a lease creating the restricted and illogical relation of landlord and tenant. In this instance, the parties elected, as they had a right to do, to make their contract in accordance with, and to express, the actual transaction agreed upon by them, and it is respectfully submitted that no court is empowered to deny them that privilege, and to make a different contract for them. Not only that, but, the agreement of sale unequivocally expressing the intent of the parties, the court is bound to respect it and to protect the interests of the respective parties thereunder. Those interests both parties have fully recognized for nearly eight years. How can a third party, asserting no proprietary right whatever in the property, now be heard to insist that the *vendor* is the owner of the ore, and that the vendee has merely *a lessee's* right in it? That contracts covering the disposition of ore in place have been quite commonly in the form of mining leases, does not, as the courts have often held, preclude the disposition of such property under other forms of agreement; and the mere fact that contracts of sale in the form of Exhibit 2 are infrequently met with must not be allowed to lead to the conclusion that there is no distinction between the two types of agreement. If there were none, no purpose would have been served in adopting the contract

of sale. It was employed intentionally, and deliberately, for the express purpose of recognizing and emphasizing, and securing the advantage of, the distinction.

If minerals had been disposed of by agreements in the form of Exhibit 2 for generations, would there be any justification in declaring a mining lease, in the form of Exhibit 1, to be a conveyance of the title to the ore, merely because it differed from the usual form of contract?

CONCERNING THE INTERPRETATION OF EXHIBIT 2.

The purpose of rules of construction is to reach the probable intent of the parties, and "a court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language, but will enforce the contract according to its terms."

13 *Corpus Juris*, 520.

The intention of the parties is to be deduced from the language employed by them:

> "To ascertain the meaning of a written agreement in which no technical word or expression is used, nothing is to be looked to except the language employed, taken in its ordinary sense, the subject matter, and the surrounding circumstances."
>
> *Vinton Petroleum Co. vs. Sun Co.*, 230 Fed., 105, 108. (C. C. A., 5th Circ.)

> "The first rule of construction is that the intent of the parties, as expressed in the words they have used, must govern. And in the absence of fraud or mistake, parol evidence cannot be received to add to or vary the contract as written."
>
> *President Suspender Co. vs. MacWilliam*, 238 Fed., 159, 164.

> "There is no charge of fraud, and the rights of the parties must be determined by the written agreement which clearly stated their respective rights and interests in the property."
>
> *Kerting vs. Hatcher*, 216 Ill., 232.

"It is a principle recognized and acted upon by all courts of justice, as a cardinal rule in the construction of all contracts, that the intention of the parties is to be inquired into; and, if not forbidden by law, is to be effectuated."

Bradley vs. Packet Co., 13 Pet., 89, 97.

The Supreme Court of Minnesota, in

State vs. Royal Mineral Association, 132 Minn., 232, 234,

has recognized that,

"A contract regarding mineral in place may be a sale, *or* a lease, *or* a license, *depending on its terms.*"

The Supreme Court of Pennsylvania has made a similar explicit statement in saying:

"A contract regarding minerals in place may be a sale absolute, a conditional sale, a lease in the ordinary acceptation of that term, or a mere license to mine and remove the minerals."

Girard Trust Co. vs. Del. Hudson Co., 246 Pa. St., 161.

Of course such statements are elementary.

But the present case seems to be an instance where elementary principles have been somehow overlooked.

The failure of the trial court to give due force and effect to the provisions of the sale-agreement in this case is a denial of the contract rights of the parties thereto, and amounts in effect to the exercise of a power, the existence of which in a court has always been denied, for it is primer-law that courts have no power to make contracts for parties, and quite as little to change the contractual status agreed upon by them.

No reason has been suggested why the agreement now before the Court should not be construed pursuant to its terms, and in accordance with the intent of the parties as clearly indicated therein.

In

Denniston vs. Haddock, 200 Pa. St., 426 (50 Atl., 197), this was discussed by the Court, as follows:

> "It has been said in a number of cases, that a conveyance of the right to mine and remove all of the coal in a given tract of land is a *sale* of the coal in place, *although the conveyance may be called a 'lease.'* The expression is unfortunate, for, while it may have produced no erroneous result in the cases where it is used, *it tends to substitute the general rules appertaining to sales for the rules properly applicable to the particular contract that may be under consideration by the Court.* Thus, for example, in Hope's Appeal, 29 Wkly. Notes Cas. 365, which is practically the starting place of the error, the agreement, though called a 'lease,' was a purchase of the coal at a fixed price per acre, making a limited gross sum, *which was payable absolutely in installments* ending within 13 years, though the lessee had a nominal term of 99 years in which to remove the coal. It was justly said by the learned Court below, whose decision was affirmed here, that *it was 'manifest that the parties contemplated an actual sale of the coal, and not a lease, in the ordinary use of that word.'* * * *
>
> "The point to be noted is, that *the rules applicable to sales are not to be applied indiscriminately to such instruments, but each is to be construed, like any other contract, by its own terms."* (Italics are ours.)

Conversely, and more clearly, where the agreement is undeniably one of sale and not of lease, there is no warrant, *especially when no question as to its meaning is raised by any party in interest,* to refuse to construe the instrument "by its own terms."

In a later case, *Gallagher vs. Hicks,* 216 Pa. St., 243 (65 Atl., 623), it was said:

> *"Nor is it disputed that a contract regarding coal in place may be a sale absolute, a conditional sale or a lease.* There is nothing revolutionary in the cases referred to. In *Dennison vs. Haddock* it was pointed out that in *Hope's Appeal* (3 Atl., 23) there was in fact a sale of the coal in place, and the case was correctly decided on that basis. But an unfortunate expression in the opinion had been the starting point

of *a tendency to class together all contracts about coal in place as absolute sales, without due regard to each particular contract, and the obligation to interpret it by its own terms and intent.* What *Denniston vs. Haddock* and the cases which have followed it did was, to check the tendency to *indiscriminate lumping of all such contracts together,* and to recall, in regard to them, the true principles of construction applicable alike to all contracts." (Italics are ours.)

The language in *Denniston vs. Haddock* and *Gallagher vs. Hicks,* upon this subject, was approved and reiterated in *Hollenback Coal Co. vs. Lehigh etc. Coal Co.,* 219 Pa. St., 124 (67 Atl., 987).

The brief memorandum of the trial court in the case at bar seems to indicate a lapse into "indiscriminate lumping of all such contracts together." Here was a departure, *ex industria,* by the parties to the agreement from the conventional lease form, and a studied adoption of a sale-agreement.

Frequently mining leases embrace provisions that are consistent with the purpose to pass to the lessee title to the ore affected thereby, and such leases have been construed by the courts as sales.

Hope's Appeal, 29 Wkly. Notes Cas., 365 (affirmed, 3 At. (Pa.), 23).
Plummer v. Hillside Co., 104 Fed., 208.
Bolland vs. O'Neal, 81 Minn., 15.
In re Lazarus' Estate, 145 Pa. St., 1 (23 Atl. 372).

"The term 'sale,' as ordinarily used, means the transfer of the absolute or general property in the thing sold. In determining whether a mineral lease of the kind here in question is a sale, neither the name nor form given to it by the statute is controlling."

State vs. Evans, 99 Minn., 220, 225.

But no language in Exhibit 2 can be construed to indicate an intention of the parties to enter into the relation of landlord and tenant.

The situation is further clarified by the fact that, if the agreement Exhibit 2 is to be construed as a mere mining lease, so that payments thereunder are in the nature of "royalty," such construction can only be arrived at by a complete disregard of the specific language of the contract, and by the necessary assumption that the Sargent Land Company *is still the owner of the ore, since only an owner can be a landlord.* By assuming the role of a tenant, the lessee acknowledges the proprietorship of the landlord in the leased property, and is not suffered to question his title.

This is one of the tests applied to determine the nature of such a contract by the Supreme Court of Minnesota in

State vs. Royal Mineral Ass'n., 132 Minn., 232, 234-5.

Reviewing the authorities distinguishing between mining leases and sales of mineral in place, and referring to some of the earlier Pennsylvania decisions, it was said:

> "On this point these earlier cases are overruled by the later cases above cited, which hold, in substance, that, *while a contract regarding mineral in place may be a sale, or a lease, or a license, depending on its terms,* an instrument such as the instruments we have here under consideration is at common law a lease without impeachment of waste. * * * It follows logically that the amounts stipulated to be paid by the lessees are rents, and they were expressly held by this Court to be rents in the Boeing case, supra, a case which involved a construction of the very leases now before the Court. They are 'the compensation which the occupier pays *the landlord* for that species of occupation which the contract between them allows.' Lord Dennison, in *Queen vs. Westbrook,* 10 Q. B. 178, 205."

In

Moore vs. Sawyer, 167 Fed., 826,

the plaintiff had entered into a contract, in the form prescribed by the Secretary of the Interior for leasing of Creek Indian lands in the State of Oklahoma, which, as recited in the opinion, purported, in consideration of the royalties and other stipulations

therein contained, to demise, grant and let to one of the defendants, for the term of 15 years, all of the oil deposits and natural gas in or under said land, with the right to prospect therefor, "and other rights usually incident to such leases."

It was contended by the defendant that this was a conveyance in fee of the oil in place, in respect of which contention the Court said:

> "The instrument here considered is termed a 'lease,' has a definite term of 15 years, and provides for an annual royalty or rental. * * *
>
> *"Applying to this instrument the ordinary rules of construction, and considering all its parts with a view to harmonizing them and arriving at the real intention of the parties,* it is, in my opinion, simply a lease, the $50.00 mentioned being a bonus paid or agreed to be paid to induce its execution."

If construed according to its terms, Exhibit 2 must be held to a sale of the ore therein described, and the payments provided for under the agreement must be deemed purchase price, and not royalties for permission to explore, mine, take out and remove ore, taxable under Chapter 226.

Pritchard vs. McLeod, 205 Fed., 24,

is a decision by the Circuit Court of Appeals of the Ninth Circuit, involving the construction of a certain instrument made between the plaintiff and defendants, the pertinent portion of which reads as follows:

> *"Whereas the party of the first part agrees to sell and the party of the second part agrees to buy all of the placer mining claims* (with the exception of one certain claim in the vicinity of Dearborn Discovery on the Inmachuk), also warehouses, houses, stables, china, and centrifugal pumps, boilers, engines, one horse, scows, tents, forges, stoves, hoes, belts, machinery, and tools of every description, camp outfit of every description, and lots and water rights owned by said party of the first part in the Fairhaven mining district, Dis-

trict of Alaska, for the sum of thirty thousand dollars ($30,000.00) upon the following terms and conditions:

"1. One thousand dollars ($1,000.00) down, the receipt whereof is hereby acknowledged.

"2. One thousand five hundred dollars ($1,500.00) note due and payable on November 6, 1908.

"3. Two thousand five hundred dollars ($2,500.00) note due and payable April 6, 1909.

"4. Twenty-five (25) per cent of the gross output of gold taken from any of the claims or fractions of claims sold by the party of the first part to the aforesaid party of the second part, to be paid over upon demand to said party of the first part until the sum of twenty-five thousand dollars ($25,000.00) is paid in full.

* * *

"10. *The intent and purpose of this agreement is that the party of the first part sells to party of the second part* all his real and personal property, of whatsoever nature, kind, or description, now owned by party of the first part in the said Fairhaven mining district."

The action was brought to recover the stipulated installments of $1,500.00 and $2,500.00 of the agreed purchase price. The opinion disposes of the nature of the contract in brief language, as follows:

"The view that the agreement is a mere option is untenable. The 'party of the first part agrees to sell and the party of the second part agrees to buy. The intent and purpose of this agreement is that the party of the first part sells to the party of the second part all his real and personal property,' etc. So reads the instrument. The obligation of McLeod to pay the items of $1,500.00 and $2,500.00 (evidenced by two promissory notes), upon November 6, 1908, and April 6, 1909, respectively, is absolute, and wholly independent of any contingency whatsoever."

The case was before the Court on a demurrer to the sufficiency of the complaint. The demurrer was overruled, and the remainder of the opinion was devoted to questions that might arise upon the trial of the case on its merits.

Globe Lumber Co. vs. Lockett, 106 La. Ann. 414,

was an action to avoid an assessment made against the plaintiffs upon certain timber standing upon property, the title to which was in a third party, the plaintiff claiming that it had no taxable interest in the timber under "certain written acts" which granted, bargained, sold, transferred and conveyed to plaintiff all the pine and oak timber, ten inches and over in diameter at the stump, growing, standing or lying upon certain described lands.

In addition, the agreement granted plaintiff the right to enter upon the land to cut, remove and transport the timber therefrom, and the purchaser was granted a term of fifteen years in which to do this. Touching the nature of these so-called "written acts," the Court said (page 416):

> "Undoubtedly they evidenced the *conveyance* of tangible property. The acts are sales, good and valid in form and substance, of property. After their execution every stick of timber, every tree, on the 10,400 acres of land, of the size and dimension of ten inches and over at the butt, became the property in full ownership of the purchaser, and there was accorded to the latter, as part of the transaction, the privilege to go upon the land for the purpose of cutting and removing the trees—this right to be exercised at the will of the purchaser for a period not longer than fifteen years. So that as a result of the sales, the plaintiff company acquired (1) the timber itself; (2) the right of entering upon the land to get it out.
>
> "It is true, the land upon which the timber stands is assessed to the owners of the fee, and the timber, separately, is assessed to plaintiff Company. * * * If the property in standing timber may be sold and conveyed separately from the land, and no one disputes this, then it may be, when thus sold, separated from the land on which it stands for the purpose of taxation."

In the case at bar, the vendee expressly agrees to pay all taxes and assessments.

Lanham vs. Henry, 135 Ga., 429,

involved the construction of a certain instrument in which it was

recited that the grantor "hath granted, bargained, sold and conveyed, and doth by these presents grant, bargain, sell and convey unto the said (grantee) his heirs and assigns, all the metallic ore and mineral interest of every description, and all ore and mineral of every kind and quality in, upon, or that may be found in or upon, a certain" described parcel of land, with the exclusive right and privilege of entering upon the premises, to take out, remove and dispose of such minerals, at any time within twenty-five years from the date of the instrument.

Without any discussion whatever, the Supreme Court affirmed the judgment of the Court below, holding that the instrument did not constitute a lease of mineral interests in the land for the said period of twenty-five years, nor a mere option or right to purchase such interest within that period; but that it conveyed to the grantee the absolute title to all the mineral described in the land.

In

Hosack vs. Grill, 204 Pa. St., 97,

an instrument which purported to "bargain, sell and convey" all the mineral coal in, upon and under a certain tract of land, and to grant the right to enter on the land and search for and remove coal in consideration of payment by the other party of a stipulated sum annually, and a further sum as royalty upon each ton of coal mined, was held to be a sale of the coal in place. In this case the instrument did not fix a term of years for the removal of the coal.

So also, in

Manning vs. Frazier, 96 Ill., 279,

under an instrument by which the owner of land, in consideration of a certain royalty per ton, "bargained, sold and conveyed" all of the coal in, upon and under said land, with an express license to the grantee, his heirs and assigns, to enter and search

for the coal, and mine and remove the same, was held to be a sale of the coal, and to sustain the enforcement of a vendor's lien for purchase money unpaid under the agreement.

See also

Gardner's Estate, 199 Pa. St., 524; 49 Atl., 349.
Plummer vs. Hillside Co., 104 Fed., 208.
In re Lazarus' Estate, 145 Pa., 1.

Agreements in the form of Exhibit 2 have not been presented for interpretation to any of the State courts of Minnesota. Before the discovery of iron ore in that State, however, the chief of its known natural resources was the extensive tracts of pine timber which covered a large portion of the northern part of the State. In many instances this timber, which now, unfortunately, has been practically exhausted, was disposed of by its owners under agreements substantially similar to those now used in connection with iron ore deposits. Those agreements were variously in the form of licenses, timber leases or contracts of sale of the timber in place. They were not always scientifically drawn, and from time to time question arose as to the real nature of the agreement. There is no distinction in principle between agreements relating to the cutting and removal of timber and those concerning the mining and removal of ore in place, and the decisions of the Supreme Court with reference to the former are applicable and controlling in respect of the latter.

Mathews vs. Mulvey, 38 Minn., 342,

was an action of trespass for cutting and carrying away pine timber belonging to the plaintiff.

The then owners of certain lands made a written contract with the plaintiff in which it sold to him all the pine timber on the land described, "said Mathews to have as long as he wishes to cut the same, provided he pay the taxes on said lands." The plaintiff neglected to pay taxes thereafter becoming due, by reason whereof the lands were sold by the State in accordance

with the statute, and were bid in by the State at the sale. Subsequently the plaintiff redeemed the lands by paying to the State the amount then due, including penalties and interest, such redemption being effected December 9, 1884. On December 4, 1884, the owners of the land conveyed the same by warranty deed to the defendants, who, however, at the time they accepted the deed, knew that the timber had been sold to the plaintiff. Judgment was rendered in the action in favor of the plaintiff, and the defendants appealed. *Chief Justice Gilfillan*, in delivering the opinion of the Court affirming the judgment appealed from, said:

"The contract in this case differs from that in *King vs. Merriman*, 38 Minn., 47, in that the contract in that case granted only the 'right, privilege, and permission to enter and cut,' during a specified time, all the pine timber fit for saw-logs growing on certain land described; while in this case the contract is, in terms, a sale of 'all the pine timber' on land described, 'said Mathews to have as long as he wishes to cut the same, provided he pay the taxes on said land.' In that case (the Merriman case) the contract was held to be one for the sale of only so much timber as the grantee might cut during the time specified, and that he had no interest in timber remaining uncut at the expiration of that time. In this, the contract must be construed as a present, executed sale of all the timber, vesting the title at once in the grantee. If nothing had been said in the contract as to the time within which the timber should be cut, there would have passed, by implication, a right to enter on the land, and cut and remove the timber, certainly for a reasonable time. But the grantee is given 'as long as he wishes, provided he pay the taxes on the land.' When this right should expire, the practical effect would be to divest the right in the timber, or at any rate to leave it a barren and unavailable right, for, as the Court said in the case referred to, 'it would be an anomaly in the law that one man should own standing timber on the land of another with no right of entry to cut and take it away.' As the title to the whole of the timber passed at once on the execution of the contract, the limitation as to the right to cut is in the nature of a condition subsequent for defeating the vested title, and not, as in the case of *King vs. Merriman*, a mere description

of the timber, (to-wit, that cut within the specified time,) the title to which should pass."

The Court then declared that the provision of the contract in respect of payment of taxes was for the protection of the interests of the grantors in the land, and that the redemption from the sale for delinquent taxes effected such protection as fully as if the plaintiff had paid the taxes before delinquency.

Another case was

Pine County vs. Tozer, 56 Minn., 288.

This case involved liability of the defendants to pay a tax levied upon their alleged interest in certain timber upon railroad lands in Pine County, Minnesota.

The fee title to the lands was vested in the St. Paul & Duluth Railway Co., which, under the existing statute, paid into the State Treasury each year 3% of its gross earnings in lieu of any taxation of its lands, so long as they remained unsold. In its essential provisions, the contract respecting the timber closely resembled Exhibit 2.

The company "granted, bargained, sold and transferred" to the defendants, all of the pine timber standing, growing or being upon certain of these lands, with the right, privilege and permission to enter thereon and cut and remove said timber at any time prior to a date named, and, when so cut and removed, and upon due payment of the purchase price, to control, own and possess said timber. One of the contracts (typical of all) provided that the defendants should pay to the Railway Company $10,000.00 a year on account of the purchase price of the timber, and, if more than 8,000,000 feet of logs should be cut in any year, unless such excess had been paid in advance of cutting by earlier installment payments, the defendants should pay $1.25 per thousand feet of such excess in addition to the specific annual installment. Until the purchase price was paid, title to the timber was to remain in the Railway Company. The principal value of the land consisted in the timber thereon.

The defendants contested the validity of the tax assessment made against the land, upon the ground that the contract constituted a mere *license,* and that no taxable interest in the real property was created in them by the contracts referred to. It became necessary therefore for the Court to construe these contracts and to ascertain the nature of the rights acquired thereunder by the defendants.

The Court stated (at page 293):

> "We are not required to fully determine exactly what title the persons who contracted for this timber acquired therein, or what their rights were. But it ought not to be urged, with any hope of success, that by means of the contracts they had secured nothing more than a bare license to go upon the lands, and to cut and remove the timber until forbidden so to do by the Railway Company, and should the right of entry be refused, their only remedy would be an action to recover damages as for a breach of contract: yet this is really the position of counsel for one of the appellants.
>
> "Under these contracts, the purchasers had secured the right to enter upon the lands and to cut and remove the timber. *That the title thereto was to remain in the Railway Company until the purchase was fully paid, did not affect the right or interest which they had obtained.* * * * They had obtained the right of entry upon the land and of possession for many years, for the purpose of cutting and removing the timber, and they had undoubtedly an interest which would have been subject to seizure and sale upon execution, not as personalty but as real estate. Their interest was not that of a licensee,—simply to go upon and occupy the land and cut and remove the timber until the license was revoked; but there was a valid grant of the right and privilege of occupying the land, and cutting and removing the timber, a part of the realty, which, when severed, would become personalty. They had acquired property rights which could not be taken away from them."

The conclusion of the Court was that defendants had an estate in the lands subject to taxation.

The case last cited has further application.

The tax attempted to be created by Chapter 226 is held by the lower court to be a property tax. Since royalties for permission to mine and remove ore are, according to the declaration of the legislature (see title of Act, R. 42), moneys paid to the *owners* of the ore removed, it follows that the property actually taxed is the ore.

But, the opinion in *Pine Land County vs. Tozer* just quoted, shows that *the vendee* under Exhibit 2 acquired "undoubtedly an interest which would be subject to seizure and sale upon execution, not as personalty, but as real estate."

By section 8 of chapter 226, the royalty tax is declared to be "a specific lien, from the time it is due and payable, upon all and singular the right, title and interest of the person to whom such royalty is payable in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid."

Section 10 prescribes the procedure for the collection of an unpaid royalty tax by an action *in personam*, brought against *the owner*, which judgment "shall be a lien upon all right, title and interest of the tax payer to the land upon which such tax is a lien from the time the same is docketed; and said lien shall continue without limitation, with interest at the rate of one per cent a month, and the said property may be sold in satisfaction of such judgment in the same manner as provided by law for the sale of property upon execution."

If, therefore, the tax be a property tax upon the interest of the owner of the ore in place (which is real estate), a judgment for the payment of such tax can be collected only from that specific interest, and it follows that it was the clear intention of the legislature, clearly expressed, to exact the tax *from such owner* and not from *his vendor* from whom he derives title.

In

Bollard vs. O'Neal, 81 Minn., 15,

the owner of certain land, in the language of the Court, "executed in the usual form, under seal, a certain instrument by which he sold the standing pine on the land to defendants." The granting clause was as follows:

> The grantors "do by these presents, grant, bargain and sell unto the said parties of the second part, their heirs and assigns, the right, privilege and permission to enter upon the following described tract of land (here follows description) at any and all times prior to the 6th day of June, 1899, on which last mentioned date this permit shall cease and terminate, and cut and remove from said lands, during said time, all of the pine timber standing or being thereon."

While the defendants were in possession of the land and engaged in removing the timber, the land was conveyed by the owners, without reservation of the pine, to the plaintiff, who brought the action to recover damages for the cutting and carrying away of the timber.

The deed to the defendants was not placed of record and the plaintiff claimed to be an innocent purchaser without notice, but the Court held that the occupancy of the premises and the logging operations, which were extensive, were constructive notice of the rights of the defendants under their deed, and put the plaintiff upon inquiry.

In respect of the nature of the contract between the owner of the land and the defendants, the Court said:

> "The deed from Wray to Mulvey and Carmichael (defendants) was not a mere license revocable at the will of the grantor. It was in effect a conveyance of the pine, with the privilege to go upon the premises within a stipulated time and remove it."

Upon principle, as well as under the authorities, then, Exhibit 2 is a *contract of sale*, and ownership of the ore passed thereunder to the vendee.

As a necessary sequence, the purchase price installments fall-

ing due under the contract do not constitute "royalties" for permission to mine and remove ore, for the right to remove it inheres in *its ownership,* and constitutes the dominion which is the essense of property and endues it with value; without the power of dominion proprietorship is nominal and worthless.

We resort once more to the dictionaries to elucidate the matter. Thus the *Century Dictionary*:

> "*Dominion*: (a) The right of uncontrolled possession, use and disposal; power of control.
>
> (b) *Act of Dominium*: *In law,* an act tantamount to an exercise of ownership."

According to *Webster,*

Dominion is "the power of governing and controlling; independent right of possession, use and control. *Law.* Absolute ownership or *dominium* (which see)."

And, under the title *"Dominium,"* we find:

> *"Law,* ownership; control; authority. In the Roman law, *dominium* in its widest sense includes all rights in rem over things; but its general use is the name of the largest or fullest right (as distinguished from lesser rights) or power over any determinate thing, unrestricted in power of disposition, unlimited in duration and indefinite in extent of user. See *ownership."*

Turning to "Ownership," we find it defined as follows:

> "State, relation, or fact of being an owner; exclusive right of possession; lawful claim of title; property; proprietorship; dominium."

In

Baker vs. Westcott, 73 Texas, 129,

"dominion" is defined to be the right in a thing from which arises the power of disposition, and the right of claiming it.

In the case at bar, the trial court said, in its principal memorandum (R. 73):

> "Looking through the Act (Chapter 226, Laws of 1923), however, at the real substance thereof, it is essentially a tax

upon the interest in the land *owned* by the person by whom the tax should be paid, and it is so considered in the determination of this case."

If this hypothesis be adopted, the decree cannot stand, since, as we have seen, the interest in the land represented by the ore was no longer *owned* by the Sargent Land Company, its property interest therein having been transferred to the vendee named in Exhibit 2. The Sargent Land Company, *not being the owner of the property*, is not subject to taxation, therefore, under Chapter 226. It elected *to sell* the ore, and its vendee elected to buy it, instead of contracting for the removal of the same under a mining lease. Such a transaction interfered with no rights of others and offended no statute or principle of law. The parties also agreed that the purchase price should be paid in installments, which likewise was undeniably lawful, and Chapter 226, constitutionally considered, is ineffective and void as respects any application to their contract.

In

Dawson vs. Kentucky Distilleries Co., 255 U. S., 288,

this court held unconstitutional a legislative Act "which imposed upon every person engaged in the business of manufacturing whisky, or in the business of owning and storing the same in bonded warehouses within the State, what was called an 'annual license tax' of 50c per gallon upon all whisky, either withdrawn from bond or transferred in bond from Kentucky to a point outside that State."

This Court approved the statement of the lower Court that "the thing really taxed is the act of the owner in taking this property out of storage into his own possession (absolute or qualified), for the purpose of making some one of the only uses of which it is capable: that is, consumption, sale, or keeping for future consumption or sale."

In other words, the tax was attempted to be laid upon the exercise of a right (with which a court has no power to interfere)

that inheres in ownership of property, and was constituted a tax on the property itself, which it was conceded would not be "uniform upon all property of the same class subject to taxation" as required by the State constitution.

The English case of

Foley vs. Fletcher, 3 H. & N., 769,

has a direct bearing upon the question of the taxability of these installment-payments of purchase price. It disposes of the erroneous conception that postponement of payment of the considsideration for ore sold by mine-owners under contract is a fact of importance in determining the character of the payment as being capital or income, and it very conclusively shows that they are not the latter. It cannot be denied that, if in the case at bar the installment payments made by the vendee under Exhibit 2 are payments of purchase price of the ore, and represent merely its conversion into money, they cannot be taxable under Chapter 226 as royalties, which, as defined by Section 2, are the consideration for "permission to explore, mine, take out and remove ore."

In the English case, the question arose as to whether similar installment-payments of purchase price were subject to taxation under the income tax Act. The plaintiff in the case, being the owner of an undivided one-half of an estate containing coal mines, joined with her co-tenant in a sale thereof to the defendants. The contract provided that the plaintiff's portion of the purchase price should be paid in semi-annual installments extending over a period of thirty years. The defendants, as each installment of purchase price became payable, deducted therefrom, under the law requiring such taxes to be witheld at the source, what they claimed represented plaintiff's income tax on account of such payments. The question in the case, as stated by *Pollock, C. B.* (at page 778), was:

> "The question is, whether, on the sale of an estate which professes to be for 99,000 pounds, of which a part is paid

down and part paid by installments extending over a long period of years, such installments are to be considered as an annuity or annual payment and liable to income tax."

He further said:

"There is nothing on this record to show that the property was not worth more than 99,000 pounds; nor is there anything to show that the postponement of payment was not a mere indulgence on the part of the seller. * * * These installments are payments of money due as capital; *the Act made no provision for such a case.*"

In a concurring opinion, *Baron Watson* said (at pages 784-785):

"But there is not a word in the Act that leads to the inference that a debt payable by installments is chargeable with income tax; and moreover a tax cannot be imposed by implication."

In conclusion, the appellants respectfully submit that, in the enactment of Chapter 226 of the Laws of 1923, the Legislature of Minnesota overstepped the manifest limitation upon legislative power contained in the constitutional requirement that "taxes shall be uniform upon the same class of subjects", and for that reason, as well as because in its operation it will take private property for public use without compensation, and without due process of law, and will deny to owners of mineral lands, the equal protection of the laws, Chapter 226 should be held invalid.

Frick vs. Commonwealth and other cases cited at page 41, *supra.*

THE DECREE MUST BE REVERSED OR MODIFIED.

But, even if the Act be held otherwise constitutional, it is nevertheless inapplicable

(1) To installments of purchase price received by the Sargent Land Company under the provisions of the sale contract (Exhibit 2), because such payments are not "royalties" subject to the tax sought to be created by the Act and, in so far as its terms are attempted to be enforced on account of such receipts, said constitutional safeguards will be violated; and

(2) To royalties received for ore mined prior to 1923, and to royalties due and payable prior to that year, because the Act can not reach retroactively these transactions and is not to be construed as having that intent.

This action having been brought to restrain the Sargent Land Company, its officers and agents, from reporting, or paying any taxes upon, moneys received by it by way of royalties under mining leases, or by way of installment payments of purchase price under the provisions of Exhibit *2*, it is obvious that the decree as entered in the court below can not stand, since, even if Chapter *226* be constitutional and enforcible as respects royalties, the payments of purchase price under Exhibit *2* are not subject to such taxation.

WHEREFORE, THE DECREE MUST BE REVERSED, EITHER

(1) *In toto*, with a direction to the court below that the defendant, Sargent Land Company, its officers and agents, and each of them, be restrained from reporting to the Minnesota Tax Commission royalties or moneys received by said Company as required by Sec. 3 of Chapter *226* of the Laws of 1923, and from paying any tax upon the same under or by virtue of the said Chapter *226*, or from otherwise complying with said Act or any part thereof; and that the defendants other than the said Land Company be perpetually restrained from seeking to enforce the provisions of said Chapter *226*, or any of them, against said Sargent Land Company, its officers, agents and property, as prayed in the bill of complaint (R. 10); *or*

(2) *In part*, and modified so far as to direct the entry of a decree in the District Court adjudging that the plaintiffs are entitled to the relief demanded in their bill of complaint to the extent that the defendant Sargent Land Company be perpetually restrained from reporting as royalties the moneys received by said Company under the provisions of said contract Exhibit *2*, and from paying any tax thereon pursuant to the requirements of said

Chapter 226 of the laws of 1923; and to the extent of restraining the other defendants and each of them from taking any action whatever under said Chapter 226 to assess, levy, or attempt to collect, any tax as respects said Sargent Land Company on account of the moneys received by it under said Exhibit 2; *and*

(3) *In part,* and modified so far as to direct the entry of a decree in the District Court adjudging that the plaintiffs are entitled to the relief demanded in their bill of complaint to the extent that the defendant Sargent Land Company be perpetually restrained from reporting as taxable royalties any part of the moneys received by it under any mining leases or under said Exhibit 2 for ores mined and removed thereunder prior to January 1, 1923, or any royalties or moneys received under such mining leases or said Exhibit 2, which became due and payable prior to January 1, 1923, but were thereafter paid; and that the defendants other than said Sargent Land Company be perpetually restrained from taking any action whatever under said Chapter 226 to assess, levy, or attempt to collect, any tax upon said moneys.

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